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ACTIONS.

A suit for the dissolution of the sale of immovable property, coupled with a demand for possession, is not a purely personal action, as it involves mainly the ownership of an immovable; it partakes of the nature of a proceeding *in rem.*

Hence such a suit may properly be brought in the parish where the property is situated, and in such a case non-resident defendants may properly be cited through a curator *ad hoc* without the necessity of subjecting their property under the control of the court by process of attachment.

McKenzie, et al, vs. Bacon, et al., p. 764.

APPEAL.

The appellant who presents a defective transcript, and who is shown to have had the transcript made through or under the exclusive supervision of his own counsel, outside of the clerk's office, is legally responsible for all defects, omissions and irregularities therein, and is not entitled to any time to correct such errors or omissions. In such a case, appellee's suggestion, without a formal motion to dismiss, will prevail, and the appeal will be dismissed.

E. H. Samuels et al. vs. J. H. Brownlee, et als., p. 34.

The Supreme Court will not undertake to examine a cause on its merits if the transcript of appeal is too imperfect and incomplete to inform the court of the matters and evidence which were contested below.

But, if the shortcomings or imperfections of the transcript are not imputable to the fault of the appellant, and if the ends of justice require a review of the judgment appealed from, the appeal cannot be dismissed; but the case will be remanded to be tried *de novo.*

This relief will be granted in a case in which the papers were destroyed by fire together with the Court House after the appellant had perfected his appeal.

Charles B. Miller vs. R. H. Shotwell, et als., p. 103.

APPEAL—Continued.

An amendment on appeal, which does not alter the practical result flowing from the judgment of the court *a qua*, but merely strikes out some irrelevant matters, will not visit costs of appeal on the appellee.

Succession of Myra Clark Gaines, p. 123.

The rule is inexorable that when the judgment has given the appellee interest to which he is not entitled and the judgment is amended by disallowing it in favor of the appellant, the costs of appeal must be borne by the appellee.

L. Holzab vs. Railroad Company, et al., p. 185.

The right of a creditor of the husband to appeal from the judgment obtained by the wife against the husband is included in the express grant of the right of appeal to third persons who allege they have been aggrieved by the judgment.

When the creditor alleges in his petition of appeal that the execution of the judgment has or would deprive him of all means of satisfying his debt, he has specified the manner in and the means by which he will be irretrievably aggrieved, and has shown sufficient reason for an appeal to be granted him.

A. Cooley vs. B. C. Cooley, p. 195.

An appeal does not lie from an order commanding an administrator to show cause on a given day why he should not be ordered to furnish additional security for the faithful performance of his official duties. No irreparable injury can be wrought him by a mere order to show cause. *Non constat* that on the trial of the rule it will be discharged and his bond will be found sufficient.

Successions of Z. and E. Labauve, p. 235.

The rule has long been settled that all parties to the record who are interested in maintaining the judgment must be made parties to the appeal from it.

Where the tableau of distribution and final account of an administratrix have been homologated and the funds have been distributed in accordance therewith, and a creditor of the deceased, who was not a party to the mortuary proceedings, appeals from the judgment of homologation, he must make the creditors who have been paid parties to his appeal.

When the petition of appeal contains no prayer for citation and none is issued, the fault is the appellant's and dismissal is the penalty of his neglect. The Act of 1839, now Sec. 36 Rev. Stats., does not cure this defect. *Succession of Treadwell, p.* 260.

APPEAL—Continued.

An order refusing or revoking permission to file a supplemental petition is not ordinarily appealable. No doubt, however, the rule would be different if the object of the supplemental petition were to engraft a revocatory action on the principal suit and to make the third persons concerned parties. Such right is given by Arts. 1972 and 1975, C. C., and being the only mode in which the revocatory action can be prosecuted before judgment, the right should be protected.

In this case, however, the supplemental petition does not present the features of a revocatory action, and the ruling of the court was correct. *Insurance Company vs. N. Gerson, et al., p.* 349.

An appeal taken from an order refusing to dissolve an injunction on the face of the papers, is not maintainable.

The rule is in the nature of an exception of no cause of action. It is merely an interlocutory order requiring no execution, producing no effect. Its rendition can work no irreparable injury, the less so when the injunction simply arrests funds in the hands of the executive officer of the court.

Successions of Z. and E. Labauve, p. 356.

On appeal from an order dissolving an injunction on bond, when a motion to dismiss the appeal on the ground that the interlocutory order appealed from could not work an irreparable injury, our decree denying the motion to dismisss and holding that the acts enjoined, if committed, would operate irreparable injury, necessarily involves the conclusion that the injunction should not have been dissolved on bond, and hence the dissolving order appealed from must be avoided and reversed.

J. M. Villavaso vs. Barthet, et al., p. 417.

No appeal lies to this Court in a case in which plaintiff claims less than $2000, on distinct contracts, from each of several defendants, not bound jointly or severally, though five in number, and the claim against each nears $1000, aggregating together some $5000. Consent cannot confer jurisdiction *ratione materiæ.*

Bridget Tague vs. Insurance Company, et al., p. 456.

Appellants have a right to join in one motion and in one bond, when the suit is a unit and one judgment only is rendered in it.

A bond conditioned for an amount ample enough to cover costs, and which is that fixed by the court in the order granting the appeal, is sufficient to support a suspensive appeal taken from a judgment in a petitory action, where the property in dispute is under seques-

APPEAL—Continued.

tration in the custody of the sheriff, and no money claim is allowed by the court.

A bond of appeal need not be signed by appellants, or by any one of them. *J. Pasley vs. H. McConnell, et al., p.* 470.

An error of calculation may be corrected by this Court upon an application for rehearing; but the rights of interested parties will be reserved. *Succession of Anger, p.* 492.

Where, in country cases, appeals are taken before judgments are signed, they may be considered as taken *nunc pro tunc.* 12 Ann. 596, State vs. McKeown.

Appeals prosecuted from judgments on forfeited bonds are treated as taken in "criminal matters" in the sense of Act 30 of 1878. State vs. Cassidy, 7 Ann. 276; State vs. Williams, 37 Ann. 200.

When the return day is fixed by the court on its own motion and not at the suggestion of appellant's counsel, though in direct violation of Act 30 of 1878, the fault is not imputable to the appellant and he cannot be prejudiced thereby.

An appearance bond taken by the sheriff, without an order of court admitting the accused to bail, or fixing the amount of bond is *null.* 6 Ann. 700, State vs. Lougineau; 12 Ann. 224, State vs. Cravey; 12 Ann. 349, State vs. Smith; 10 Ann. 532, State vs. Gilbert.

When the record enables the court to decide on the merits, either party may, at any time, refer the court to any error *apparent* on the face of the record, without making a formal assignment thereof. *State of Louisiana vs. Balize, p.* 542.

A suspensive appeal bond reciting in *substance* that it is given as surety that appellant shall prosecute his appeal, and pay such judgment as may be rendered against him is good.

A devolutive appeal bond filed in the clerk's office before the expiration of the return day fixed in the order of appeal, is in time. *I. N. Glover vs. Taylor, p.* 634.

Where a third person appeals suspensively from a judgment making peremptory a mandamus directing the sheriff to accept a bond which has been tendered for release of property attached and to release the attachments, and where the condition of the appeal bond is "to satisfy whatever judgment may be rendered against the *appellant,*" the obligations of the bond are restricted to the condition so expressed and, on failure to prosecute the appeal, cannot be extended to embracean obligation to satisfy the judgment which

APPEAL—Continued.

had been rendered against the sheriff, or to pay general damages occasioned by the appeal.

Nor can the principal be held for damages outside of the terms of the bond, without proof of malice and want of probable cause. His position is similar to that of the original prosecutor of a civil suit, except in so far as the law has made a distinction between them in the requirement of bond.

Friedman Brothers vs. Lemlee, p. 654.

The omission of appellant to ask for citation of appeal and to have it served on appellee, when the order of appeal has been granted on motion in open court at a term different from that on which the judgment was rendered, is fatal to the appeal which must be dismissed.

Wheeler & Pierson vs. Peterkin et al., p. 663.

In appeal from a judgment rendered by a justice of the peace to a district court, where a motion is made to dismiss the same on the ground that the matter in dispute is under the lowest limit of the appellate jurisdiction of this Court, the appellant should be permitted to offer evidence to maintain his appeal, unless his want of right to the appeal conclusively appears from the face of the papers.

The State ex rel. Fontenot vs. Judge, etc., p. 718.

Where a judgment is rendered on an opposition to an account of a tutor charging him with a personal liability to the heirs represented by him, an appeal from such judgment taken by him in his capacity as tutor only, will not be entertained.

Tutorship of Minor Heirs of Byland, p. 756.

Any neglect or omission to observe the rules of this Court strictly, in the preparation of transcripts of the record in the court below, will subject the clerk to the cost of repairing such neglect or omission; and a mandate will be directed to him, ordering him to perform his duty; and, in the meantime, judgment on the appeal will be suspended.

The appellant is protected by the full certificate of the clerk where it is not shown that he *knew* the transcript to be deficient and procured the certificate notwithstanding.

Troustine & Co. vs. Ware et al, p. 779.

Where the amount in dispute is really under the lower limit of the jurisdiction of this Court, though in the averments and prayer it

APPEAL—Continued,

be greater, the claim will be considered as fictitious and the appeal dismissed.

G. L. Bright vs. A. Thompson et al., p. 801.

In a license suit, the clerical error of charging defendant with pursuing, without a license, "the business of vegetables" in a public market of the city, instead of the business of *dealing in or selling* vegetables, will not be considered when first raised in this court, because no other "business of vegetables" could be conducted in a public market except that of selling or dealing in them, and because, in absence of any note of evidence, *non constat* that evidence received without objection might not have remedied the deficient allegations.

Defendant's contention that he was exempt under art. 206 of the Constitution because following "an agricultural pursuit," is not sustained by any evidence in the record showing that fact.

The State of Louisiana vs. Cendo, p. 828.

In this suit for license on the business of "selling at retail," the defendant is described as "conducting the business of butcher in the Ninth Street Market, whose receipts exceed $1000." Objection to this variance cannot avail, in absence of any note of evidence in the transcript, because we know that butchers in public markets do sell meats at retail, and it may have been proved that defendant followed such a business.

A butcher, in so far as he slaughters and dresses animals, may possibly be classed as a laborer or mechanic; but as such branches of his business cannot lawfully be pursued in the public markets of New Orleans, and as we have no note of the evidence received below, we cannot apply the exemption invoked under art. 206 of the Constitution.

The State of Louisiana vs. Buisseau, p. 829.

Where on appeal by an opponent it appears that he has not been heard at all, but was refused hearing on a stated ground, and a judgment dismissing his opposition was entered, it is not necessary that the inventory and a mass of documents that have no relation to the issue presented by the appeal should be copied in the transcript, and a motion to dismiss for the absence of these unnecessary and irrelevant documents will not be sustained, if the pleadings, bills of exception, and other matter needful for a proper presentation of the issue to be decided, are in the transcript.

Succession of E. Commagère, p. 830.

APPEAL—Continued.

Where a motion to dismiss the appeal is made on the ground of the deficiency of the transcript as shown by the clerk's certificate, and the transcript is completed and the missing evidence supplied, and the certificate converted under a *certiorari* from this Court before the case is submitted, and no delay is occasioned by the steps taken for the completion of the transcript, the appeal will not be dismissed.

Mrs. A. Huyghe vs. H. Brinkman, p. 836.

An appeal lies from a judgment dismissing interventions the object of which is to claim the ownership of the effects seized and to subject them to money claims, where the property, which is the matter in dispute, is shown to be worth more than two thousand dollars.

Parties deeming themselves aggrieved by a judgment may, when appealing therefrom, join in one motion and furnish one bond.

The motion and the bond should be filed in the proceeding in which the judgment appealed from was rendered. It would be irregular to offer them in a different proceeding, though the intervention were filed therein.

A bond in favor of "the clerk of the court," satisfies the law. The name of that official is utterly insignificant.

E. G. Schlieder vs. L. B. Martinez, p. 847.

Where plaintiff's demand is less than two thousand dollars, accompanied by an attachment, and judgment is rendered for the debt sued for, but the attachment is dissolved, this Court is without jurisdiction to review the judgment either as respects the debts or the dissolution of the attachment.

Yale & Bowling vs. H. Routh, p. 894.

An appeal, in which the transcript was not filed within three judicial days after the return day, and in which a motion for extension of time was not seasonably made, will be dismissed, notwithstanding an order extending the time, but granted after the expiration of the legal delay prescribed for making the same.

Such orders are granted at the risk of appellants, and will not save the appeal when it appears that they were inadvertently made.

The absence of counsel does not fall within the category of circumstances beyond the control of an appellant, and is not a sufficient excuse for not filing a transcript in time, or making a seasonable motion for additional delay.

World's Exposition vs. Railroad Company, p. 905.

ASSESSMENT.

Property must be assessed in the name of the true owner. If assessed in any other name, the assessment is defective and cannot be the basis of a legal tax sale.

A woman divorced from her husband is in the same situation toward him as though no marriage had ever been contracted between them. She has the legal right to resume her original name, and property which she buys and which is recorded under that name cannot be legally assessed against her under another name, not even under her former name as a married woman.

Mrs. S. Maspereau vs. New Orleans et als., p. 400.

The action of the police jury, sitting as a board of reviewers, is of a *quasi* judicial character, and should not be disturbed except for cogent reasons and upon clear and satisfactory proof of error in assessment.

Railroad Company vs. Tax Collector, p. 760.

When an assessor finds a person in the quiet possession of property, as owner under an apparent title purporting to be derived from a judicial sale, he is justified in assessing the property in the name of the person thus holding.

He is not required to examine the court records and investigate the proceedings pertaining to the title claimed and determine the question of its validity before acting.

Mrs. Mason et al. vs. E. L. Bemiss, p. 935.

Section 9, of Act 107 of 1884, only confers upon the City Council of New Orleans power to revise valuations and correct descriptions of property actually assessed and entered upon the rolls by the board of assessors. It does not authorize the council to make original assessments or to list property which the board has omitted from the rolls. Such omissions are to be corrected by the board of assessors in the manner pointed out by Section 2 of the same act.

J. H. Mercier et al. vs. New Orleans, p. 958.

ATTACHMENT.

An attachment cannot legally issue against a succession or the property thereof, whether the succession is opened and administered in this State or in any other State.

A. Levy vs. Succession of T. L. Lehman et als., p. 9.

When the judge has granted an order authorizing the defendant to release writs of attachment and sequestration on bond, which order has not been executed, he may order the suspension of its

ATTACHMENT.—Continued.

execution until hearing of the parties, when he discovers reason to believe that it was improvidently granted.

Nothing in the law prevents a defendant from releasing the crop gathered and ungathered on a plantation by giving a bond for one-half more than its value, without being under the necessity of bonding the plantation which was also attached. The right of defendant in an attachment to bond should be favored, as mitigating the harshness of the remedy and as restoring the property to commerce or to use.

J. B. Lallande vs. A. W. Crandell, p. 192.

In this suit for damages for wrongful attachment, it appearing that, prior to the attachment, the financial embarrassments of plaintiffs were such as to necessitate the stoppage of their business unless they could obtain relief from some source; and it not appearing that there was any source from which such relief could be obtained, they cannot recover damages for breaking up of the business and loss of credit therein as occasioned by the attachment.

The sale of plaintiffs' rice mill, voluntary or forced, being inevitable, and they having tried in vain to find a purchaser before the attachment, and the forced sale thereof having been made after due advertisement and on twelve months credit, and no evidence being produced to show that any one was or had been ready or willing to buy at a higher price, and none to show any deterioration in value resulting from the seizure, we are bound to accept the price bid at the sale as the criterion of its value, and to reject the demand for damages on that account.

Considering the open and honest dealings of plaintiffs and their faithful efforts to pay their creditors at every sacrifice, communicated to all interested and to defendants themselves, the latter's proceeding by attachment, on the charge of fraudulent intent, was peculiarly injurious and insulting to plaintiffs, and substantial damages are allowed therefor.

McFarland & Dupre vs. Lehman, Abraham & Co., p. 351.

An attachment bond made payable "unto James T. Clark, Clerk of the Civil District Court and his successors in office," etc., is a bond in favor of the clerk of that court as required by the law, and is not invalidated by the fact that Clark had ceased to be clerk and had been succeeded by another. The bond being judicial is to be construed according to the law under which it was executed; and

moreover, the terms "successors in office" clearly embraced the actual clerk.

Garnishees who provoke unnecessary litigation in resisting the enforcement of their obligations, must bear the costs when the decision is against them. *M. Scooler vs. W. Hestrom*, p. 907.

ATTORNEY-AT-LAW.

Where the fee of an attorney is a contingent one, as where he agrees to prosecute the suit for one-half that may be realized from the claim or the judgment thereon, prescription for the fee only begins to run from the time it is exigible, that is from the collection of the judgment. *J. H. Shepherd vs. L. Dickson*, p. 741.

BILLS AND NOTES.

The holder of a promissory note, acquired for a valuable consideration, before maturity, can recover of the maker the full amount of same and the enforcement of the mortgage securing its payment, when the only defense urged against it is a deficiency in the quality of land sold, and the seller has been discharged from all responsibility thereon by defendants.

People's Bank vs. Mrs. Trudeau et als, p. 898.

It is an elementary principle of the law of negotiable instruments that such equities subsisting between the original parties cannot be set up against a *bona fide* transferee for value before maturity.

Where the notes were taken in payment of a debt, knowledge by the transferee of the actual insolvency of the transferor, even if proved, could give rise to no relief, except under a revocatory action, of which the petition in this case wants the essential features in the allegations, the prayer and in the parties made.

Flower, Adm., vs. Mrs. Noble, etc. p. 938.

CERTIORARI.

The supervisory jurisdiction of the Supreme Court under a *certiorari* must be restricted to an examination into the validity of the proceedings held in the lower court; it cannot be exercised to review the judgment as to its correctness either on the law or on the facts of the case.

The supervisory powers of the court must not be confounded with its appellate jurisdiction.

The State ex rel. Gooch vs. Justice of the Peace, p. 968.

CITATION.

An appearance by an attorney for a defendant in a cause, except for the purpose of excepting to the citation, cures the want of citation.

Tutorship of Minor Heirs of Byland, p. 756.

CONSTITUTIONAL LAW.

A claim for reimbursement of money paid in error, even when reduced to judgment, does not arise from a contract, but from the law, and is not protected by the provision in the Federal Constitution, which prohibits States from passing laws impairing the obligation of contracts.

A State constitution, when it does not conflict with that Constitution, is omnipotent in its disposition and even destruction of private and social rights.

A State may divest vested rights without infringing the paramount law of the land.

The State ex rel. Neugass vs. City, p. 119.

The legality and constitutionality of the Private Market Ordinance of the city of New Orleans, No. 4798, A. S., have been hitherto fully affirmed by this Court.

Under art. 86 of the Constitution, prosecutions for the violation of said ordinance may be properly carried on in the name of the State.

The State of Louisiana vs. Natal, p. 967.

COMMON CARRIERS.

Railroad companies, as public carriers, have the right to eject passengers from their cars for non-compliance with their reasonable rules.

The rules of a city railroad company, acting under a contract with the city, which requires the company to carry passengers over two sections of its line for one fare, which requires such passenger to keep and show, undetached by him, a coupon ticket, as a voucher of his right to continue on the car beyond a given point, are reasonable in law.

Any passenger refusing to comply with said rules may be ejected from the car. *DeLucas vs. Railroad Company*, p. 930.

COMMUNITY OF ACQUETS AND GAINS.

A policy of insurance on the life of a man vests the rights to the policy and to the fund arising on the happening of the loss, at the date of the execution of the contract. This has been frequently held in cases where third persons are the beneficiaries, and the same rule must apply when the beneficiary is the insured himself or "his administrators, executors or assigns." Hence when such a policy is taken out by an unmarried man, the rights and interests thereunder belong to his separate estate, and do not fall into a community arising under a subsequent marriage. If in such case premiums have been paid by the community, it is entitled to have such pa-

COMMUNITY OF ACQUETS AND GAINS—Continued.

ments reimbursed to it as expenditures made by it for the benefit of the separate estate of the insured spouse.

Estate of Jacob E. Moseman, p. 219.

When separate funds or property of the husband have been used to benefit and enrich the community, it will constitute a debt of the community in favor of the husband to the amount of such fund or the value of such property. But the evidence must establish, with reasonable certainty, that the funds were thus used or the property thus employed.

The community of acquets and gains includes, at its dissolution, presumptively, everything found in the succession of the deceased spouse, and without reference to the amount brought into the marriage by the respective spouses.

Succession of M. Foreman, p. 700.

In order to charge the community for separate account of the *husband*, the proof must show, with reasonable certainty, that his property or money, has been used for the benefit of the community.

Succession of Eugene Breaux, p. 728.

CONTRACTS.

The owner and the pledgee of certain notes entered into a contract with a third person, by which the latter agreed to pay a certain sum for one of the notes, past due, on a fixed day, and the pledgee bound himself to hold the note and to present it on that day, and to deliver it to the third person upon payment of the sum agreed on that day.

Held: That this contract did not create a mere continuing obligation with a term, but was a commutative contract under which the pledgee was bound to present the note on the day fixed, and the third person was only bound to pay, if so presented. The pledgee had only bound herself to deliver, in case on presentment the payment was made on that date. Had the note been presented on the day fixed and not paid, the party could not have claimed delivery on subsequent payment; and it is a necessary sequence of this that the pledgee, not having presented the note according to the contract, could not demand payment on a subsequent presentment.

The owner of the note having been guilty of no fault, and having lost the benefit of the third person's obligation by the fault of the pledgee, the latter is bound to make good the damage occasioned him thereby. *J. H. Hynson vs. W. Pugh et al., p.* 68.

Conventional interest cannot be recovered without proof of a contract

CONTRACTS.—Continued.

to pay such. Legal interest only can be allowed in the absence of such contract.

A claim to the ownership of securities pledged cannot be recognized when it is apparent that the pledgor did not transfer them and the pretended conveyance was made by one who never had any title to the ownership thereof, to the knowledge of the pledgee.

The value of stock cannot be recovered as the price thereof, where it is not shown that a contract to sell and purchase was entered into directly, or by an authorized agent.

The transfer of stock by a banking institution to one of its creditors, in part liquidation of his indisputable claim against it, does not justify recovery of the price value of the stock from one to whom such creditor subsequently conveyed it, in settlement of his indebtedness.

If the original transaction be null, because *ultra vires*, it is not enforceable against the transferee or his assigns.

The giving of a letter of credit to a bank to be used solely in case of an emergency or of a financial panic, and if necessary to maintain and restore the bank, does not authorize the use of it, unless in the cases stipulated.

Recalling such letter and declining to honor drafts under it, where the amount, if paid, could not possibly have saved the bank, gives no right to recover the same. Such recalling does not forfeit the right of preference which the pledgees have on the securities in hand.

John Crossley & Sons, Limited, vs. Commissioners, etc., p. 74.

The two defendant companies entered into a contract whereby the Louisiana company transferred to the Pennsylvania company certain valuable rights and privileges in consideration of the Pennsylvania company's agreement to pay to the bond subscribers of the Louisiana company who would transfer their subscriptions to it a certain amount of money.

Held: That this created an obligation on the Pennsylvania company to pay the money, subject to the suspensive protestative condition of the bond subscribers transferring their subscriptions, and no term having been fixed, the obligation was not discharged by the failure and refusal of the plaintiff, a bond subscriber, for a time, to accept the benefit of the contract. Having subsequently offered to perform the condition by transferring his subscription, the Pennsylvania company's obligation to pay became complete, it

CONTRACTS—Continued.

having received and enjoyed the full consideration of its contract, and plaintiff's vacillation and delay having placed it in no worse condition.

Inasmuch as plaintiff's suit is in affirmance of the contract which it was alleged the Louisiana company had no right to make, and as it is not the latter's fault that plaintiff has not long since received the stipulated consideration, plaintiff's claim against the Louisiana company has no foundation.

H. Beer vs. Light and Heat Co. et al., p. 330.

A stipulation in a contract between a planter and his manager that the latter would receive as compensation for his services one-third of the net proceeds of the crops raised by him must be construed to mean the proceeds realized from the crops after deduction of all charges and outlay, such as costs of cultivating, of saving, of shipping and of selling the same.

In such a contract, a stipulation that the manager or employee is to share in the losses of the enterprise cannot be construed as including the loss of working animals by death from natural causes

F. Gomez vs. Isaac Levy, Jr., p. 420.

A party who contracts with a factory for the manufacture of certain goods, and receives a partial delivery of such without objections or complaint cannot, subsequently complain as an alleged violation of the manufacturer's obligation under the contract that the goods had not been manufactured in conformity thereto.

After the debtor has been put *in mora*, his offer to execute the contract under his engagement comes too late.

Enders vs. Gingras, Mulhaupt & Co., p. 773.

Under a contract wherein a firm or commercial partnership undertakes to furnish the capital required to prosecute a designated enterprise to a third person named, who agrees to manage and control same through his influence, and the net profits thereof are to be equally divided, the expense thereof is upon the latter, unless the contrary is stipulated or agreed upon.

G. Pilsbury vs. Friedlander et als., p. 909.

CORPORATIONS.

Private corporations must be authorized by the legislature or established according to law. When legally established, they may hold real estate, and receive legacies and donations.

They may enact statutes and by-laws for their government.

The right of succession is inherent to their nature, and they transmi their successions and their rights of property.

CORPORATIONS—Continued.

A corporation cannot fulfill another office of public or personal trust.

A corporation legally established may be dissolved by an act of the legislature, if they deem it necessary for the public interest.

The Grand Lodge was incorporated by an act of the legislature in 1816, and given full powers to hold real estate and to receive donations and legacies. It also chartered all such subordinate lodges as the Grand Lodge had at that time created, and conferred upon them equal powers.

By the act of 1819, all lodges that had been organized in the *interim*, were likewise incorporated, and those which might be subsequently organized also.

As a general rule the question as to the forfeiture, or dissolution of charters and acts of incorporation is one which concerns the public order, and the corporation is presumed to exist for all purposes of justice until the forfeiture is declared by the judgment of a competent court in some proceeding to which the State is a party. *Williams vs. Lodge Masons of Monroe, p.* 620.

The statute authorizing the organization of corporations for literary, scientific, religious and charitable purposes, prescribes the course to be pursued in order to effect such incorporation, and also the method of making amendments or alterations of the original articles. Courts cannot regard or give effect to amendments not made in compliance with the mode prescribed by the statute.

Where the charter provides that the board of delegates, themselves elected annually, shall annually elect a chief engineer, the action of one board in electing such officer for a term of five years, cannot destroy the right and duty of succeeding boards to elect the engineer according to the charter.

The first election only conferred upon the person elected the right to hold the office for one year, or until his successor was elected and qualified, and when, after the expiration of the year, a succeeding board of delegates has elected another to the office, his qualification ended the term of the former occupant, whose former election was no valid or legal warrant for continuing in the office.

Failure to elect on the day fixed in the charter did not exhaust or destroy the power, and did not invalidate an election held at a subsequent regular meeting.

The State ex rel. Piper vs. Batt, p. 955.

CRIMINAL LAW.

APPEAL.

An appeal in a criminal case made returnable "*according to law*" and which ought to be returned at the place where the court holds sessions, will be dismissed, *proprio motu*, when the transcript is filed at an improper time and place, where the court was not sitting.

When such an appeal is granted and the transcript is certified in June, from Iberville parish, the transcript should have been filed either at Monroe or Opelousas, at which the court was holding sessions in that and the following month and not at New Orleans where it was not sitting.

The State as well as the accused has an interest in the speedy determination of criminal cases.

The State of Louisiana vs. N. Joseph et al., p. 33.

An order of appeal in a criminal case, making an erroneous return both as to time and place, when suggested by appellant, is illegal and will not sustain the appeal.

An appeal lodged by appellant at a place different from that designated in the order, cannot be considered by the Supreme Court, and on motion will be dismissed.

The State of Louisiana vs. S. Cohn, p. 42.

The State can appeal in criminal cases after verdict rendered and judgment has been arrested.

The State of Louisiana vs. B. E. Brabson, p. 144.

While judges are prohibited from commenting on the facts to the jury in a criminal trial, they are required to give to the appellate court their reasons for refusing instructions that are prayed.

The State of Louisiana vs. T. J. Boasso, p. 202.

A motion for a new trial on the sole ground that the verdict is contrary to law and evidence, is not entitled to notice in this Court.

The State of Louisiana vs. J. Smith, p. 301.

To determine whether the venue was proved or not, would require this Court to consider the evidence on this point, and this the court cannot do, however the evidence may be presented in the record.

The State of Louisiana vs. A. Tanner et al., p. 307.

An appeal in a criminal proceeding, asked *after* the term during which the judgment complained of was rendered and made returnable on appellant's suggestion, on an improper day, must be dismissed as sought and returned too late.

The State of Louisiana vs. S. Burns et als., p. 363.

A bill of exceptions to the ruling of the judge in refusing a new trial,

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which simply states the fact of the overruling without any recitation of facts relied on or statement of grounds on which the judge acted, affords no basis for reviewing the ruling, because it affords no certification of the facts recited in the motion.

Newly-discovered evidence, merely tending to impeach or discredit witnesses who have testified on the trial, does not necessarily afford ground for new trial, and we are not disposed to disturb rulings on such question.

The State of Louisiana vs. E. Offutt, p. 364.

Motions for appeal in criminal cases tried in Orleans parish must be filed within ten days after sentence. The law regulating criminal appeals expressly prohibits granting them after ten days have elapsed from sentence.

Appeals in criminal cases from Orleans must be made returnable within ten days after granting them.

The law regulating appeals in criminal causes cannot be relaxed when its provisions are plain and its requirements absolute.

The State of Louisiana vs. Chas. Madlar, p. 390.

An appeal taken in a criminal case and made returnable within ten days after the order of appeal is granted, will be dismissed if the transcript of appeal is not filed on the return day, or within three judicial days thereafter. Sec. 4, Act 30 of 1878; State vs. Butler, 35 Ann. 392.

The State of Louisiana vs. J. Francis, p. 464.

The appeal taken by a party from a conviction and sentence for a crime, and who escapes from custody during the pendency of the appeal, cannot be prosecuted by counsel, and hence must be dismissed. State vs. Edward, 36 Ann. 863, affirmed.

The State of Louisiana vs. Mansfield, p. 563.

Identity of a party at the bar with the convicted accused, is a matter of fact which the district court can determine at the time of passing sentence and with which this court cannot interfere, where the question is not presented so as to enable it to decide whether the trial judge was right or wrong.

The State of Louisiana vs. W. Whitney, p. 579.

The Supreme Court will not consider evidence submitted by the accused in a criminal case, in support of a motion for a new trial, unless said evidence be embodied in, or otherwise made part of, a

CRIMINAL LAW—Continued.

APPEAL.

bill of exceptions reserved by the defendant to the refusal of a new trial by the judge.

This Court cannot consider a complaint of alleged misconduct of an officer in charge of jury, not previously submitted to the trial judge and suggested for the first time on appeal, and by brief or argument. *The State of Louisiana vs. E. Deas, p.* 581.

A motion for new trial that is unaccompanied by any bill of exceptions, or evidence touching the errors complained of, will not be examiued.

Unless the record discloses a bill of exceptions, motion in arrest of judgment, proper assignment of error, or error apparent on its face, the judgment will be affirmed.

The State of Louisiana vs. Wire, p. 684.

An appeal returnable at New Orleans on the first Monday in November in a criminal case, which ought to have been made returnable at Shreveport at the opening of the term, will be dismissed where it is apparent that the return day is suggested by appellant in the body of his motion.

It will not relieve the appellant even if the return day was suggested by the judge.

The error of the judge was accepted and became that of the appellant and is a fault imputable to him.

The State of Louisiana vs. Stephens, p. 928.

An appeal in a criminal case will not be dismissed on the ground that the transcript of appeal has not been filed in the Supreme Court on the return day, if it appeared that it was filed within three judicial days thereafter.

The State of Louisiana vs. Corcoran, p. 949.

CHARGE.

Where it appears from the statement of the evidence attached to a bill of exception that the laws, touching which a charge was asked of the judge, had no application to the case, he did not err in refusing the charge on the ground that it had no such application.

The State of Louisiana vs. P. Simmons, p. 41.

By our statute the trial judge is expressly forbidden to give the jury in a criminal case any opinion as to what facts have been proved or disproved. *The State of Louisiana vs Hahn, p.* 169.

When a judge has already charged the jury on a given matter and the prisoner, among his requests of charges made thereafter, includes the matter already charged, the judge may well refuse to repeat it.

CRIMINAL LAW—Contined.

CHARGE.

When a trial judge has already charged the jury that the State must affirmatively prove that the offense had been committed within the jurisdiction of the court, and a request is made afterwards for that matter to be charged, a misunderstanding of the purport of the request provoking the observation that there was no doubt of the court's jurisdiction is not serious matter of complaint. The essential thing is that the jury have been charged on that point correctly. *The State of Louisiana vs. T. J. Boasso, p.* 202.

When a bill of exceptions recites the facts which the counsel had contended before the jury, had been established by the evidence, and refers to the evidence in support thereof, and asks for charges applicable to the state of facts recited, the judge's refusal to give the charges on the ground that they are inapplicable to the case, is error, unless the judge states that there was no evidence in the case supporting or tending to support the contentions of counsel.

It is the duty of the judge to give full instructions to the jury covering the entire law of the case as respects all the facts proved or claimed by counsel to be proved, provided such claim is supported by any evidence.

Authorities reviewed and criticised.

The functions of the judge in such case is different from that involved in rulings on admissibility of testimony, when he is entitled to weigh the testimony as to proof of necessary foundation, as a matter involving the exercise of his own discretion.

The State of Louisiana vs. Tucker, p. 536.

The issue by the trial judge of a bench warrant on the motion of the prosecuting attorney for the arrest and detention of a witness who had just testified before the jury on the charge of perjury, is not an act prohibited by the statute, which forbids the judge "in his charge to the jury to state or repeat the testimony of any witness, or to give any opinion as to what facts have been proved or disproved," particularly when there is no allegation that he alluded to or commented upon the testimony of such witness.

The State of Louisiana vs. Strado, p. 562.

The opinion recently rendered on a former trial of this case, is reaffirmed; and it is further held that where the charges asked are applicable to the facts and contentions of counsel as recited in the bill of exceptions, the judge is not authorized to refuse the charges because, while not denying the material facts stated, he disputes

CRIMINAL LAW—Continued.

CHARGE.

the correctness of the contentions of counsel based thereon. Counsel has the right to urge his own theory as to the inferences of motive and intention to be drawn from the facts, and to impress the same upon the jury; and though the judge may take a different view, the question is to be determined by the jury, and in case the jury should concur with counsel, defendant has the clear right to have them instructed as to the law applicable in such case.

The State of Louisiana vs. Tucker, p. 789.

The rule that the jury is bound to accept and apply the law as laid down by the judge, and that it cannot disregard it without violating its oath and duty is reaffirmed; and it is not error to refuse a charge "that if the jury cannot conscientiously believe that the judge has charged the law correctly, they do not violate their oath in disregarding it." Such a principle would utterly emasculate and annul the rule.

It is not essential that the violence inflicted by the defendant should have been the sole cause of the death; but if it hastened the termination of life, or really contributed, mediately or immediately, to the death in a degree sufficient to be a clear contributing cause, that is sufficient. *The State of Louisiana vs. Matthews, p.* 796.

After charging the jury, as the Constitution requires, that they are the judges of the law and of the facts in criminal cases, it is proper that the judge should instruct them to the effect that they are the sole judges of the facts, but that, as regards the law of the case, they should be governed by the charge of the judge thereon. Affirming State vs. Ford, 37 Ann. 465; State vs. Vinson, 37 Ann. 792; State vs. Hal Matthews, recently decided at Shreveport.

The State of Louisiana vs. Cole et al., p. 843.

DISTRICT ATTORNEYS.

Under the Constitution and laws of this State, district attorneys are vested with full discretion, not under the control of courts, to prosecute offenses *not capital*, either by indictment or by information, as in their judgment the interest of the State or the ends of justice may require—and the discretion thus vested in them cannot be affected by the fact that the grand jury may be in session at the same time and in the same parish.

The State of Louisiana vs. Cole et al, p. 843.

CRIMINAL LAW—Continued.

EVIDENCE.

A copy of a coroner's inquest, by the clerk of the Criminal District Court who is the legal custodian of the same, is admissible in evidence.

A motion in arrest of judgment cannot be entertained where it is not based on errors patent on the face of the proceedings.

Testimony in support of such motion cannot be received.

The State of Louisiana vs. S. Roland, p. 18.

Proof of previously communicated threats against the life of the accused by the deceased in cases of homicide, is inadmissible unless preceded by *proof* of some assault or hostile demonstration by the deceased against the accused at the time of or immediately preceding the killing.

The question of the admissibility of such evidence is within the exclusive province of the trial judge, who must be satisfied that proper foundation has been laid before admitting the evidence, and who has the legal discretion to disbelieve testimony which to his mind appears incompatible with the proven facts and circumstances of the case.

Rulings on this point in the cases of Ford, Labuzan and Janvier, 37 Ann., reaffirmed. An accused cannot be allowed to introduce as evidence his own declarations of motives and intentions connected with the killing, made to another person previous to the homicide. *The State of Louisiana vs. S. Spell, p.* 20.

Under an indictment for entering a store with intent to steal, the prosecuting witness testified substantially that he had walked into the back part of his premises, leaving the store in charge of a child, when he heard the child exclaim, "You are being robbed!" and thereupon rushed into the store and saw the accused in the act of running out. Held, that the judge did not err in overruling an objection to the admissibility of the child's exclamation on the ground that it was hearsay, and in holding that it was admissible as part of the *res gestæ*.

The State of Louisiana vs. F. Moore, p. 66.

In order that a party may contradict his own witness, a proper foundation must be laid therefor, by proper inquiry as to time, place and person involved in the supposed contradiction, putting him fully on guard. The subject-matter of the testimony to be contradicted must also be material and relevant to the issue, and the contradic-

CRIMINAL LAW—Continued.

EVIDENCE.

tion must be not merely for the purpose of discrediting his testimony generally, by showing that in immaterial matters, his statements were untrue.

The State of Louisiana vs. W. Clark et al., p. 105.

Oral testimony is admissible to prove the official character of the witness on the stand, when his capacity is not a matter at issue.

A witness cannot be permitted to testify to part of a conversation his memory being deficient as to the other parts, unless such part of the conversation be essentially to make up a deficiency or connecting link, which otherwise would remain unexplained and a foundation has been previously laid.

The State of Louisiana vs. J. Smith, p. 301.

Where the defendant has attempted to impeach the testimony of witnesses for the State, the latter may support the same by evidence, character for veracity and integrity.

The State of Louisiana vs. D. Boyd, p. 374.

Res gestæ are events speaking for themselves through the instinctive and spontaneous words and acts of participants, and not words of the participants when narrating the events. The distinguishing characteristic of these declarations is that they must be necessary incidents of the criminal act or immediate concomitants of it, and that they are not due to calculated policy.

Time does not absolutely and alone determine whether a statement is a part or not of the *res gestæ*. No inflexible rule as to the length of the interval between the act of killing and the declaration of the victim can be formulated. The facts of each case must speak for themselves.

If the declarations are unconsciously associated with and related to the homicidal deed, even though separated from it by a short time, they are evidence of the character of the deed and are a part of the *res gestæ*.

Where the deceased, ten minutes after he had been fatally shot, said to a witness, "if he had not been so willing to fight he would not have been shot by the defendant," the statement is a part of the *res gestæ* and should have gone to the jury.

The State of Louisiana vs. E. Molisse, p. 381.

Although the court may have refused to permit the prosecuting officer to introduce other evidence after the case has been closed, yet when the jury requests to be permitted to have the prosecuting

CRIMINAL LAW—Continued.

EVIDENCE.

witness brought before them for the purpose of examining the nature and locality of his wounds and of questioning him in relation thereto, it lies in the discretion of the judge to grant the request and such permission is not error.

When the defense offers to question the State's witness with a view to ascertain whether or not he has been a penitentiary convict, for the purpose of establishing his incompetency, and the question is ruled out on the ground that the record is the best evidence, and when no objection is made at any time to his competency, and the record, though claimed to be in the trial court, has never been produced on the trial or on motion for new trial, we must presume that there was no foundation for such objection, and that even if the court committed error, it was immaterial and no ground for reversal.

Where the counsel on either side puts to his own witness a question grossly leading and seeking to elicit evidence in itself inadmissible, the judge has the right to interfere and prevent such proceeding, even in absence of objection by opposing counsel; and such action furnishes no ground for reversal, if the ruling was otherwise correct.

A witness in a criminal case has the privilege of declining to answer a question which tends to criminate himself; and when he claims this privilege the judge is right in declining to compel him to answer. *The State of Louisiana vs. L. Crittenden, p.* 448.

After the evidence is closed on the trial of a motion in which the evidence is taken down, the trial judge may allow a witness to correct his statement as taken down, without reopening the evidence so as to be compelled to hear other and further evidence.

The declarations of accused made, not at the time of the commission of the offense, but subsequently in reply to the charge against him, are not part of the *res gestæ;* they are self-serving and inadmissible. *The State of Louisiana vs. G. Gonsoulin, p.* 459.

An accomplice joined in the same indictment with the prisoner to be tried may testify, provided he be not put on trial at the same time. 23 Ann. 78; 25 Ann. 522; 7 Ann. 379.

While the jury may convict on the testimony of an accomplice alone, the judge should caution them, in prudence, not to return a verdict of guilty unless such evidence is corroborated—but this

CRIMINAL LAW—Continued.

EVIDENCE.

Court will not control him as to the language he shall employ in giving them such instructions.

The State of Louisiana vs. N. Mason et al., p. 476.

Oral testimony is admissible to prove the contents of an indictment and other important documents which were lost or mislaid, and of which there existed no copy or record.

The State of Louisiana vs. W. Whitney, p. 579.

A person to whom complaint has been made by the victim of a rape, when placed on the witness stand, cannot be permitted to repeat all the details of the outrage and the name of the ravisher as re-reported to her, but can only testify as to the fact of the complaint being made and as to the condition of the victim when making the complaint. Such testimony is not to be regarded as independent and original evidence to establish the guilt of the accused, but its purpose is to support the testimony of the person outraged.

The counsel for one accused of such crime, who seeks to impeach the testimony of the principal witness by showing contradictions between the statements of such witness made on the preliminary examination and those made on the trial, should be permitted to read parts of the previous deposition and ask the witness if she had so testified, and should not be compelled first to read to her the entire deposition out of the presence of the court and jury.

The State of Louisiana vs. Robertson, p. 618.

The rule is that dying declarations are admissible if made under a sense of impending dissolution, which soon thereafter transpires. 1 Glf. sec. 158; 30 Ann. 365; 31 Ann. 95; 32 Ann. 1086; 36 Ann. 920, State vs. Moliss. *The State of Louisiana vs. Keenan, p.* 660.

The State is not entitled to prove, in support of a charge of burglary of a house, and the larceny of a pocket-knife therein by the accused, another burglary at a different time and place and the larceny of a gold watch, to interpret the intent of the accused, in the commission of the former.

The State of Louisiana vs. Johnson, p. 686.

Parol evidence is inadmissible to prove the pendency of an indictment in a court of record. A copy of the indictment and the minutes of the court showing its presentment and filing would be the best evidence of the fact. *The State of Louisiana vs. Grayson, p.* 788.

CRIMINAL LAW—Continued.

EVIDENCE.

Where a person, after being wounded, sends for a minister and declares to him that he expects to die, has no hope of recovery and continues to speak in this strain till his death, the condition of mind prerequisite to making a valid dying declaration, is sufficiently proved. *The State of Louisiana vs. Jones, p.* 792.

In criminal cases the order to separate witnesses is not one of right, and its modification by the judge within reasonable grounds must be left to his discretion. Hence, the ruling of a trial judge in rejecting the testimony of a party who had obtained admission in a court-room, on declaring that he was not a witness, and who was thereafter tendered as a witness by the accused, will not be disturbed on appeal. No fixed rule can be adopted in such matters. Judges must be guided by the peculiar circumstances surrounding the offer of such testimony.

The State of Louisiana vs. Cole et al., p. 843.

In a prosecution for manslaughter, it was urged that a few minutes before the killing the deceased and a number of companions were assembled at a certain place; that they left there together and went to the place where the accused was found and was pointed out by one of the parties to the deceased, who was told by the one thus pointing him out to go and talk to him; and the deceased, without speaking, immediately approached the accused and seized him by the throat and beat him in the face; that the accused pulled loose from his assailant and retreated to the middle of the street, where he was followed by the deceased, again seized violently and beaten by him. In which last struggle the mortal blow was given by the accused. At this stage of the testimony the witness on the stand, and who was one of the party that had accompanied the deceased, was asked in substance, when this attack was made on the accused, what did you do, and what did each one of the party present do (naming each one), at the same time and place, which question was objected to, the objection sustained, and the witness not permitted to answer. Held, that the ruling was error. It is not true that the *res gestæ* can consist only of what was said and done at the time by the participants in a combat. They may embrace what was said and done by any and all present, which have any bearing on the affair or are in any manner connected therewith.

The State of Louisiana vs. Corcoran, p. 949.

CRIMINAL LAW—Continued.

FORGERY.

Where the name forged to an instrument is, or is supposed to be, fictitious, and not the name of any real person, and inquiry is to be made of the residence or existence of such person, it is proper to call the police officers or other persons well acquainted with the place where this person is supposed to live, or is said to live, in order to show whether he does live there. And even if inquiries have been made in the place by a stranger, his testimony as to the fact of inquiry and the result of it is admissible, though it may not be satisfactory proof of the non-existence of the person in question.

If the forged name be that of a fictitious instead of a real person, the offense of forgery is complete if the instrument has the appearance of being valid on its face.

Where the forgery is of a fictitious name, it would be error to charge the jury that there must be some evidence of similitude to the signature of a real person, because when there is no original there can be no similitude.

It is not necessary to prove that an accused forged an instrument in order to constitute the crime of uttering or publishing a forged instrument. The two offenses are distinct.

To constitute the crime of uttering a forged instrument, it is not essential that a fraud has been actually perpetrated by it. It is sufficient that there is the intent to defraud, and this intent may be inferentially proved.

The State of Louisiana vs. Hahn, p. 169.

There can be forgery of a certificate of marriage where no marriage was ever celebrated just as there can be forgery of a promissory note where there was no indebtedness of the maker whose name is forged. As there can be a pretended marriage so there can be forgery of a certificate of marriage that never took place.

It is not essential that the forged instrument be one that, if genuine, an action might be brought on it. If it could be used as proof in a suit either against him, whose name is forged, or in a suit against any other, whether to sustain a claim made or in defense of one, it is susceptible of forgery.

Our statutes dispense with the need of setting out any copy or *fac simile* of the forged instrument in the indictment, and it may be described by its usual and common name. It is not necessary to set out anything more than is necessary to accurately and adequately express the offense. It is neither necessary nor proper to

CRIMINAL LAW.—Continued.

FORGERY.

set forth matters of evidence in the indictment, nor to set forth the kind of suit or matter of contestation in which the forged instrument is receivable in evidence.

The publisher or alterer of a forged instrument need not have been the forger of it. The two acts are distinct and constitute two different and well-defined crimes.

The State of Louisiana vs. T. J. Boasso, p. 202.

The essential elements of forgery to be charged against the accused and proved are three:

1st. A writing, in such form as to be apparently of some legal efficacy.

2d. An evil intent, of the sort deemed fraudulent, in the mind of the defendant.

3d. A false making of such writing.

A jury ought to *infer* an intent to defraud the person who would have to pay the instrument, if it were genuine, although from the manner of executing the forgery, or from that person's ordinary caution, it would not be likely to impose upon him.

The State of Louisiana vs. Ford, p. 797.

INDICTMENT.

Where the blank for the year in an indictment is unfilled, the State may amend by inserting the proper year even after the evidence has closed.

In charging the crime of an assault with intent to commit a rape, it is not duplex pleading to charge a battery as well as an assault. The assault is a component part of the crime, an ingredient of it, and the battery is only an aggravation of the assault, both being the acts of the accused while endeavoring to carry out his intent to commit the more heinous crime.

The State of Louisiana vs. A. Fontenette, p. 61.

Where, under a statute punishing the offense of entering a shop with intent to steal, the indictment used the word "store" instead of shop, the variance is immaterial, as long since decided. 5 Ann. 340.

The State of Louisiana vs. F. Moore, p. 66.

In a criminal prosecution, the papers of which have been purloined from the clerk's office, the district attorney has the legal right to enter a *nolle prosequi* of the charge contained therein, and to present a new indictment or information on the same charge against the same party. To hold otherwise would render the State pow-

CRIMINAL LAW—Continued.

INDICTMENT.

less against a criminal who had friends to purloin the papers of his case.

An indictment or information which in two separate counts charges the offense of putting out an eye with a *club*, and the crime of assault with intent to commit murder with a *club*, is not bad for duplicity. The two offenses could grow out of the same act, hence they may be charged in the same indictment.

The State of Louisiana vs. Joe Pierre, p. 91.

In an indictment for murder it is not essential that the name of the deceased should follow the word "murder." If it be in another part of the sentence so that it certainly appears to be the object of that verb, and there can be no doubt upon whom the crime is charged to have been committed, it is sufficient to answer the requirements of our statute.

If the prisoner is fully informed by the indictment for the murder of what person he is accused, so that if he had been acquitted he could plead *autrefois acquit* to another indictment for the murder of the same person, the indictment is good.

The State of Louisiana vs. B. E. Brabson, p. 144.

Where it is charged that an offense was committed *at* a certain point, the word *at* means *in*.

In an indictment it is not necessary to specify that the deceased (Martha Calhoun) was a human being.

The State of Louisiana vs. J. Smith, p. 301.

A motion in arrest of judgment is well founded when it is levelled at an indictment which charges that the accused "feloniously did shoot with a dangerous weapon with intent to commit murder." Such indictment should have charged besides that the act had been done "wilfully and with malice aforethought."

The State of Louisiana vs. Ed. Scott, p. 387.

In an indictment for shooting with a dangerous weapon with intent to murder, under section 791, R. S., although it is not necessary expressly to charge an assault, yet as an assault is necessarily implied in the charge, the setting of it out is innocent surplusage, and the larger crime being otherwise properly charged, a conviction thereof will be sustained.

The indictment containing in its caption and commencement a full description of the State, parish and judicial district, the charge

CRIMINAL LAW—Continued.

INDICTMENT.

that the crime was committed in the "State, parish and district aforesaid," is a sufficient laying of the place.

The State of Louisiana vs. L. Crittenden, p. 448.

Objection to an indictment based on the ground that a member of the grand jury that found the bill was disqualified must be urged before trial, and cannot be taken advantage of by motion for new trial or motion in arrest.

The State of Louisiana vs. Mary Griffin, p. 502.

In an indictment for perjury it is not essential that the authority and jurisdiction of the court administering the oath should be expressly averred, if they sufficiently appear from the facts set out.

When the prosecution for perjury is in the same court in which the perjury was committed, it may take judicial cognizance of its own jurisdiction, if the indictment sufficiently sets forth the facts.

Although the materiality of the matter sworn to be not expressly averred, yet if the indictment sets forth the facts from which the materiality appears, that is sufficient.

The State of Louisiana vs. Schlessinger, p. 564.

In an indictment for perjury it is not essential to charge expressly that the court in which the perjury was committed was of competent jurisdiction, or that the matter sworn to was material, if facts are set forth which justify the inference that the court had jurisdiction and that the matter was material.

Neither is it essential to state in such an indictment that the judicial proceeding, which was a prosecution for murder, and in which the perjury was committed, and which is described specifically, was pending on an indictment found by a grand jury.

The State of Louisiana vs. Grover, p. 567.

An indictment is not amenable to duplicity, because it charges one or more acts contemporaneously, germane in character, and altogether making one offense, although each of said acts constitutes in itself a minor offense of the same genus with the graver one charged.

The State of Louisiana vs. Hendricks, p. 682.

Where the mortal blow is given in one parish, but death ensues in another, the crime may be prosecuted in either parish, and it is not essential to the validity of the indictment in such case that said facts should be averred therein. The crime may be charged to have been committed in the parish where the bill is found.

The State of Louisiana vs. Jones, p. 792.

CRIMINAL LAW—Continued.

INDICTMENT.

A clerical error in writing a name in an indictment cannot be invoked as vitiating the proceeding. 32 Ann. 782; 35 Ann. 293.
The State of Louisiana vs. Ford, p. 797.

A razor is not a dangerous weapon within the intendment of Revised Statutes, sec. 832.

An indictment which charges that the accused "did have, and carry, concealed on or about his person, a certain dangerous weapon called a razor," is bad.

Whether the instrument named in the indictment as a "dangerous weapon" is one within the meaning of the statute, the trial judge must decide, on hearing a motion to quash or one in arrest of judgment, as upon every other essential ingredient of an indictment. *The State of Louisiana vs. Nelson, p.* 942.

Where a statute uses the words "willfully or maliciously" to qualify the act therein declared an offense, the indictment may charge the act as "wilfully and maliciously done; or it suffices if it is charged as wilfully done or as maliciously done, using either of the qualifying words alone.

Where a common law crime, such as murder, forgery, or the like, is denounced by a statute *by name, indictments for* such crime should be charged in the words and qualifications prescribed by the common law for indictments for such offenses.

When, however, a statute denounces a certain act or acts an offense and specifically describes the act, though such offense may bear a close relation to a well known common law offense, and belong to the same species, the offense thus declared is properly a statutory offense, and may be charged in the language of the statute.

An indictment under section 843, for setting fire to and burning an outhouse, etc., charging that it was done "feloniously, unlawfully and maliciously," is valid.
The State of Louisiana vs. Philbin et al., p. 964.

INFORMATION.

An information under Section 792 of the Revised Statutes, which charges that the accused wilfully, feloniously and of his malice aforethought * * * shot into and among a crowd with intent to kill and murder some person or persons, is not bad for duplicity.

The description of the *animus* of the shooting is sufficient to qualify the intent to commit murder.

CRIMINAL LAW—Continued.

INFORMATION.

The information is not deficient for using the words *into* and *among* instead of the word *at* used in the statute. It is not deficient because it does not in terms charge an *assault*, when it appears that other words used contain the necessary ingredients of an assault.
The State of Louisiana vs. W. Samuels, p. 457.

In an information charging an assault with intent to kill, it is not necessary that the pleader should qualify both the "act" and the "intent" as felonious. To qualify the intent is sufficient.

The averment that the party assailed was then in the peace of the State, is not necessary to be proved; its omission is therefore not a matter of substance which would vitiate the information; hence, objection grounded on its omission cannot be made by a motion in arrest of judgment.
The State of Louisiana vs. Sonnier, p. 962.

JURY.

A juror accepted on the faith of the truth of his sworn answers, but who on cross-examination contradicts himself, may be challenged peremptorily before the oath is administered to him.
The State of Louisiana vs. S. Roland, p. 18.

Alleged errors in rulings of the judge affirming the competency of jurors who were objected to by accused, have no weight when the jurors were peremptorily challenged and did not serve on the jury, and when it does not appear that accused's peremptory challenges were exhausted before the jury was empanneled.
The State of Louisiana vs. P. Simmons, p. 41.

The words "Foreman Grand Jury," following the signature of the foreman, mean Foreman of the Grand Jury.
The State of Louisiana vs. J. Smith, p. 301.

The disqualification of a juryman for the reason that he is a convicted felon cannot be taken advantage of in a motion in arrest of judgment. It is assimilated to the disqualification of alienage and non-residence and objection must be made before conviction.
The State of Louisiana vs. S. Williams, p. 361.

It is not error for a judge to sustain a challenge for cause to a juror on the ground that he does not understand the ordinary use of the English language. *The State of Louisiana vs. E. Offutt*, p. 364.

In criminal cases the Supreme Court cannot review the verdict of the jury on questions of fact. The jury are the sole judges of the

CRIMINAL LAW—Continued.

JURY.

sufficiency of the evidence as to the guilt or innocence of the accused. *The State of Louisiana vs. R. S. Williams, p.* 371.

Opinion based on conversations is no ground for challenge of a juror when the juror states that he can try the case according to the law and the evidence, taking the law from the court and the evidence from the sworn witnesses, and do exact justice, regardless of such opinion. *The State of Louisiana vs. D. Boyd, p.* 374.

In order to set aside the venire, accused must point out and establish some material illegality in the drawing and show some material injury to himself.

A man living near the line between two parishes is a lawful juror in that parish in which he is a registered voter and claims his residence, when the line has not been legally and definitely settled, and it is not positive which side it would place him on when so established.

The jury is presumed to be legally composed, and he who asserts the contrary assumes the burden of proof.

Applications for a change of venue are largely within the discretion of the trial judge. His action may be reviewed by this court, but his conclusion relating thereto will not be disturbed unless it clearly appears that he has misapplied the law or the facts.

To entitle accused to a change of venue, the prejudice against him must be so general throughout the parish as to render it impracticable for him to get a fair and impartial trial.

The State of Louisiana vs. G. Gonsoulin, p. 459.

The requirements of the jury law of this State contemplate the trial of causes by the jurors on the regular venire as long as any of them can be secured or obtained, and they consider talesmen simply in the light of substitutes for the jurors of the regular venire, who are to be called or used only when regular jurors are not to be had

Hence, in a case in which a list of talesmen has been summoned under the orders of the court, because the regular venire had been exhausted, and it appears that while proceeding with the list of talesmen, a jury previously engaged on a case, reports and is discharged, it then becomes the duty of the trial judge to resume the call under the regular venire, until that be exhausted, before continuing to form a jury from talesmen.

CRIMINAL LAW—Continued.

JURY.

The ruling of a trial judge in rejecting a juror under a challenge for cause by the State, affords of itself no legal ground of complaint to the accused. The right of peremptory challenge is a right to reject but not to select.

The State of Louisiana vs. W. Creech, p. 480.

A juror cannot be heard to impeach his own verdict. 3 Ann. 435; 6 Ann. 653; 35 Ann. 1032.

The State of Louisiana vs. Isaac Bird, p. 497.

A juror who, when sworn on his *voir dire*, says that from what he knows of the character of the accused he has a little prejudice against him, but that this feeling can, in no manner, affect his verdict and that he will be governed solely by the law and the evidence, is not incompetent.

The State of Louisiana vs. Jones, p. 792.

NEW TRIAL.

A new trial is not grantable because of newly-discovered evidence, the sole object of which is to impeach the veracity of the leading witness for the State, nor on the ground that a witness for the State has made statements since the trial at variance with his testimony upon it, especially when the lower judge holds that other testimony warranted the conviction, or does not believe the newly-discovered witnesses.

The greatest reliance is placed on the trial judges in refusing new trials in criminal causes, and it would be an unwise restriction to hold that they shall not take into account their belief that false swearing has been resorted to in order to break a conviction and obtain a new trial.

The State of Louisiana vs. S. Williams, p. 361.

A motion for a new trial made in a criminal cause, after sentence, after the case has been finally closed and an appeal taken, comes too late.

Hence, the trial judge does not err if he refuses to direct his clerk to include such tardy and irrelevant proceedings in the transcript of appeal.

Therefore, the Supreme Court will not entertain any proceeding intended to coerce the district judge to order the introduction of such foreign matters in the transcript.

The State of Louisiana vs. E. Offutt, p. 364.

CRIMINAL LAW—Continued.

NEW TRIAL.

The fact that unexpected evidence was adduced furnishes no legal ground for a new trial. Wh. Cr. Pl. and Pr. § 884.

Accused is not entitled to a new trial because he or his counsel made a mistake in not adducing his entire evidence at the proper time. Wh. Cr. Pl. and Pr. §§ 876, 877.

The State of Louisiana vs. G. Gonsoulin, p. 459.

A former acquittal for the same offense cannot be urged as newly-discovered evidence in support of a new trial. Such fact must have been known to defendant, and evidence to that effect could only have been offered under a special plea of *autrefois acquit.*

Jurors cannot be heard to impeach their verdict; and when no objection is urged to the correctness of the judge's charge, the allegation that the jury misapprehended its meaning, supported by the affidavit of a juror to that effect, cannot be sustained as ground for a new trial.

The State of Louisiana vs. Miles Bates, p. 491.

A charge of the judge, in a capital case, that is not reduced to writing, and to which no bill of exceptions was taken at the time, cannot be examined upon an application by accused for a new trial. 34 Ann. 106, 1213; 35 Ann. 543, 773.

An objection that the verdict of the jury is contrary to law and the evidence is bad. 33 Ann. 313; 11 Ann. 478.

An objection, raised for the first time upon an application for a new trial, that one of the jurors who tried the case was an unnaturalized citizen, comes too late; it should have been urged when the juror was offered to be sworn. 8 R. 590; 13 Ann. 276; 21 Ann. 546, 257; 26 Ann. 383.

The State of Louisiana vs. Isaac Bird, p. 497.

An accused is not entitled to compulsory process for obtaining witnesses in his favor, in support of a motion for a new trial.

The provision of the Constitution (art. 8) touching witnesses in criminal cases, applies to witnesses on the question of the guilt or innocence of the accused, and has no reference to motions for new trials or other proceedings connected with a criminal cause.

The Supreme Court will not disturb the rulings of trial judges, in their manner of fixing and hearing motions for new trials or similar proceedings unless the same appear on their face arbitrary or glaringly unjust.

Evidence intended to impeach the testimony of witnesses on the trial

CRIMINAL LAW—Continued.

NEW TRIAL.

is not a legal ground for a motion for a new trial on the ground of newly discovered evidence.

The State of Louisiana vs. Gauthreaux et als., p. 608.

The complaint of an accused that he was refused further time to prepare a motion for new trial five days after conviction, cannot be entertained.

Such matters are within and must be left to the sound discretion of the trial judge. *The State of Louisiana vs. Major, p.* 642.

When an accused person has been tried and a verdict of guilty returned against him, the trial judge is without power or authority to grant a new trial *ex proprio motu*.

The trial judge is in no sense the custodian for the accused, and it was not his duty to take care of his welfare.

There would have been ample time for him to consider measures for his relief when applied for by the accused.

The State of Louisiana vs. Williams, p. 960.

OATH.

Being sworn by a clerk, in the presence of the court, is being sworn by the court; and an oath administered by an officer, though incompetent, in presence of the court, is regarded as administered by the court.

The power to administer an oath is a ministerial one.

This Court has no power to pass upon and decide whether there was a variance between the proof administered and the indictment when presented in connection with a motion for new trial for the first time.

An objection that witnesses who testified at, or jurors who sat upon, the case, were sworn by an officer without any legal authority to administer an oath, comes too late after verdict against the accused; and objection to same cannot be entertained for the first time on application for a new trial.

The State of Louisiana vs. Dreifus, p. 877.

PERJURY.

There is an essential difference between a judicial and non-judicial oath. A judicial oath is one taken before an officer in open court; and a non-judicial oath is one taken before an officer *ex parte*, or out of court.

In case perjury is assigned on a judicial oath, it is sufficient that the

CRIMINAL LAW—Continued.

PERJURY.

person acting is one of a *class* of officers having *prima facie* authority, and does administer the oath with due formality and solemnity, in the presence of the court, it having jurisdiction of the proceedings.

In case perjury is assigned on a non-judicial oath, it is insufficient to maintain a conviction, if the person administering the oath was not legally authorized to administer *that particular oath.*

The State of Louisiana vs. Dreifus, p. 877.

PLEAS IN BAR.

The pleas of *autrefois convict* and *autrefois acquit* have derived from the common law principle that no person shall be twice put in jeopardy of life or limb for the same offense, and neither of the pleas can be sustained unless the previous trial invoked as a plea in bar shall have been for the same charge contained in the new indictment or information, and unless the evidence required in one charge would be sufficient to establish the other.

Hence the plea in bar is not good to defeat a charge of "assault with a dangerous weapon, to-wit: a knife, with the intent to kill and murder and inflicting a wound less than mayhem," when it appears that the previous trial of the accused set up in bar, had been on a charge of robbery, althounh at the same time and on the same person. *The State of Louisiana vs. Helveston et al., p.* 314.

PRESCRIPTION.

The fact that a justice of the peace hears rumors of an offense in the neighborhood does not show that such offense was "made known" to him, so that prescription will begin to run in favor of the offender. To have that effect it must be made known by affidavit before him. R. S. 986, 2058.

The State of Louisiana vs. G. Gonsoulin, p. 459.

State vs. Alexander Belize affirmed.

Proof administered of the previous prosecution of *another* "*person*" accused of *same* "*offense,*" is not proof of knowledge by the prosecuting officer that the accused had committed the offense, and he cannot thereby sustain his plea of prescription.

The State of Louisiana vs. H. Hanks et als., p. 462.

STATUTES.

The judges of the "City Courts" of New Orleans, under the Constitution of 1879, replace the justices of the peace under the former sys-

CRIMINAL LAW.—Continued.

STATUTES.

tem, and inherit the power to solemnize marriages from them. They are expressly required to make an "act" of every marriage they celebrate, and the common and usual name of such "act" is a marriage-certificate.

When a criminal statute makes an "intent to defraud" an ingredient of a crime, it does not mean only an intent to deprive one of personal property. Defraud has a broader meaning in such case and means to prejudice the rights of another in any way.

The State of Louisiana vs. T. J. Boasso, p. 202.

Section 805 R. S. denounces 1st, The forcible seizing and carrying a person against his will out of the State; 2d, The forcible seizing and carrying a person against his will from one part of the State to another; and 3d, The imprisoning or secreting a person without authority of law. It is not necessary to charge that the person imprisoned or secreted was forcibly seized and imprisoned or secreted.

It is sufficient to charge in the language of the statute that the person was carried from one part of the State to another and not from one parish to another, and proof that the carrying of the person was from one part of a parish to another, or from part of a city or town to another, will sustain the charge in the bill on this count. This Court cannot determine whether the evidence does or does not justify the verdict.

The State of Louisiana vs. R. T. Backarow, p. 316.

An information charging the accused with an assault with a dangerous weapon, to wit: a certain pistol * * * with intent then and there wilfully, feloniously and of his malice aforethought to kill and murder, etc., is a sufficient compliance with the requirements of Section 792 of the Revised Statutes, which denounces among others the crime of an assault with intent to commit murder.

The State of Louisiana vs. R. S. Williams, p. 371.

Article 29 of the Constitution, which provides that every law of the General Assembly must embrace but one object, and must express the same in the title, is mandatory, and any enactment which violates it is null.

Act No. 64 of 1884, entitled "An Act to provide for the punishment of the offense and crime of malicious threatening or threats, the malicious sending of threatening letters or communications of malicious

CRIMINAL LAW—Continued.

STATUTES.

publications, or resorting to malicious acts, or threats of injury to person, reputation or property, though no valuable thing be demanded, or sought to be extorted," embraces at least four separate objects, and is, therefore, unconstitutional, null and void.

The State of Louisiana vs. Heywood, p. 689.

TRIAL.

The Constitution and laws guarantee to a party charged with crime the right to be heard by counsel, and where the party is unable to employ counsel, it is the duty of the court to assign one. This right is not an empty formality, but an inestimable privilege, and the counsel so assigned should be allowed a reasonable time to make preparation for the defense, and where under oath he states that he has been unable to do so, assigning just reasons therefor, and asks a delay for the purpose of preparation, and it is refused him and he has not been wanting in diligence, *held* that such ruling was error. *The State of Louisiana vs. R. Simpson, p.* 23.

An accused whose case is fixed for the second week of the term has not the right to require service of the list of jurors drawn for the third week of the term.

In a case not capital the jury may be allowed to separate during the trial. *The State of Louisiana vs. Joe Pierre, p.* 91.

The constitutional right of being heard by counsel, cannot be construed into meaning that a prisoner's counsel must be permitted to re-argue *ad-infinitum* all that had already been argued and to repeat all that had already been said. There must be some restraint of the volubility of counsel since there must be a limit to the duration of a criminal trial.

The State of Louisiana vs. T. J. Boasso, p. 202.

When the term of the district court has been fixed and begun two weeks before the session of the Circuit Court, and the accused has been tried and convicted before the beginning of the latter term, and when, having no business, the Circuit Court does not meet, the district court violates no law in continuing its term for the purpose of disposing of motions for new trial, etc., and passing sentence on the convicted defendant.

When a defendant has been once arraigned and has pleaded to an indictment on a former trial, re-arraignment is unnecessary, and if

CRIMINAL LAW—Continued.

TRIAL.

made, it is no objection that the case has been previously set for trial. *The State of Louisiana vs. D. Boyd, p.* 374.

Courts have always the right to correct their minutes so as to conform to the facts, especially when such facts are within the personal knowledge and recollection of the court.

It is not essential that accused should be present at the filing and trial of motions and pleas not involving the question of guilt or innocence on the merits. It is sufficient if the minutes show his presence at the arraignment, trial, verdict and sentence. 32 Ann. 560; 34 Ann. 121; 35 Ann. 9.

The State of Louisiana vs. Gonsoulin, p. 459.

An objection urged, after verdict, that the accused was not served with the list of the jury, comes too late. 23 Ann. 620, 621.

The State of Louisiana vs. N. Mason et al., p. 476.

A party who has been arraigned, even though it be on the very day of his trial, and who goes to trial without objecting to the lateness of the time at which he was arraigned, cannot take advantage of the alleged irregularity after trial, by means of a motion for a new trial.

The order of the trial judge separating the witnesses during the trial, falls within the legal discretion vested by law in trial courts, and a modification of the same by the judge, within reasonable bounds, will not be disturbed on appeal.

The State of Louisiana vs. G. Harrison, p. 501.

Where there are two judges in the same district clothed with equal powers and jurisdiction and authorized by statute to provide rules for the regulation of their courts and fix the terms thereof, and under this authority they have fixed their respective terms, it does not vitiate the proceedings because an accused has been tried and convicted at a term of the court which the judge presiding thereat was only authorized to hold in the absence of or inability of the other judge to attend, to whom such term was regularly assigned under the rules, where such absence or inability is shown by the record. *The State of Louisiana vs. Mary Griffin, p.* 502.

It is not only the right but the duty of the trial judge to order the correction of the minutes of his court so as to make them conform with the true facts as they occurred.

The State of Louisiana vs. Major, p. 642.

CRIMINAL LAW—Continued.

TRIAL.

This Court will not interfere with the orders made by trial judges concerning the discipline of their courts. Hence, a complaint that a judge called a particular case out of its order as fixed on the trial docket, will not be entertained on appeal. Parties should consider that the district judges in this State are not mere ministerial officers, or much less children, whose every step must be traced and controlled by superior authority, but that their courts have certain inherent powers.

The State of Louisiana vs. Cole et al., p. 843.

VERDICT.

A verdict finding the *prisoner* guilty is a verdict against the defendant.

The State of Louisiana vs. J. Smith, p. 301.

A verdict will not be set aside because the jury was taken into a room to deliberate on their verdict where there were a number of law books on the subject of crimes and criminal proceedings, where there is no evidence that the books were read or examined by the jury.

The State of Louisiana vs. A. Tanner et. al., p. 307.

In criminal cases, all the essential facts must be found by a special verdict, in order to enable the court to give a judgment of law upon the matter in issue. Nothing is to be taken by the court by implication or intendment. What is not found is supposed not to exist.

Hence, in a trial under a statute which denounces the offense of "receiving or buying any goods or chattels that shall be feloniously taken or stolen from any other person, knowing the same to have been so stolen or taken," a verdict of "Guilty of knowinly receiving stolen property" does not contain the legal requirement touching the intent with which the goods were received by the accused, and it cannot therefore be the basis of a legal sentence.

The State of Louisiana vs. Burdon et al, p. 357.

A verdict (on an information containing two counts) in these words, "*Guilty—with intent to murder*," being responsive to the first count, is not defective for not containing the words, *with a dangerous weapon*, which are necessarily implied.

The State of Louisiana vs. T. M. Smith, p. 479.

The judgment appealed from sustained a motion in arrest on the ground of defect in the verdict, and remanded the prisoner to custody to await a new trial. The accused, contending that the legal

CRIMINAL LAW—Continued.

VERDICT.

effect of sustaining the motion in arrest, on the ground stated, was to terminate the case and to entitle him to a discharge, and thus to make it a final judgment, prosecutes this appeal to correct the alleged error in remanding him to custody.

He is entitled to have the question passed on.

There was no error in the action of the judge *a quo*. The defect in the verdict was that, being special, it found accused guilty of no crime denounced by law, and it thus falls under the authority of Foster's case, 36 Ann. 857, and Burdon's case, 38 Ann., in both of which the verdict was set aside and prisoner remanded for new trial.

The case is different from those of Day, 37 Ann. 785, and Murdock, 35 Ann. 729, where the verdicts were not defective in form or substance, but were only set aside because not warranted by the indictment.

Reasons given for the distinction.

The State of Louisiana vs. Oliver, p. 632.

A verdict of guilty of shooting with intent to kill is not responsive to the charge of shooting with intent to murder, nor does it meet any offence denounced by any statute of the State.

Where the indictment is good but the verdict returned is unwarranted and illegal, and is, therefore, annulled and set aside, the accused is thereby not entitled to his discharge, but can be tried again under the same indictment.

The State of Louisiana vs. Hendricks, p. 682.

DAMAGES.

Railroad companies are held to the greatest care and diligence both in regard to the machinery and equipments of the road and the conduct and acts of their officers, agents and employees.

One who goes on a freight train by permission of the conductor, or the engineer acting as conductor, and pays the usual fare, is entitled to the privileges and protection of a passenger, even though the officer has been forbidden to receive passengers on such trains; provided, such order was not known to the passenger.

The going on a freight train and even taking a seat in the cab of the locomotive by the direction of the engineer in sole charge, is not contributory negligence *per se* on the part of the passenger, who has paid his fare, especially where persons are habitually or occasionally received on such trains and placed in the same or like places thereon.

DAMAGES—Continued.

Where the conduct of a passenger has contributed to the casualty, but such conduct has not been, *in a legal sense*, imprudent or negligent, he may recover if the defendant were in fault.

Hanson, Tutor, vs. Railway and Transportation Co., p. 111.

A servant who assumes the discharge of duties, the nature and mode of performance of which are fully known to him, voluntarily subjects himself to risks necessarily incident thereto, and unless such risks were increased by some other fault or negligence of the master, injury resulting therefrom will not be the subject of reparation by the master.

In the operation of coupling trains the relation between engineer and brakeman is that of fellow-servants and subject to the rule that the master is not liable for injury occasioned to one servant by the fault of another servant, in absence of proof of fault in the master in the employment or retention of the latter.

In this case the evidence fails to establish any fault or negligence for which defendant is responsible, but shows that the injury resulted from the mischievous act of an unknown third person, for whose act the defendant was not responsible.

M. H. Wallis vs. Railroad and Steamship Co., p. 156.

Touching the corresponding rights and duties of railroad companies in constructing their works, the rule of law requires that a railroad company, in enforcing its right of way over the lands of others, and in constructing its road, should leave the adjoining lands and fields which it crosses in the same condition as regards the facilities of cultivation and as concerns the utility of those lands to their owners as they were before the entry of the company.

Hence a railroad company which constructs an embankment on the lands of a planter, and thereby stops up his ditches and other artificial drains, is responsible to such owner for all losses of crops and other damages occasioned by such interruption of his drainage.

H. M. Payne vs. Railroad and Steamship Co., p. 164.

The doctrine that a passenger in a public conveyance is in some way identified with the owner or driver of it so that he cannot recover of the owner of another public conveyance for injuries caused by a collision of the two, when he has exercised no control over the conduct of the driver of the vehicle in which he is riding, is unjust, illogical and indefensible.

The correct rule is that where one is riding in a public conveyance and

DAMAGES—Continued.

has exercised and can exercise no control over the driver of it, and a collision occurs between it and another public conveyance, caused by the joint negligence of the drivers or managers of the two vehicles, the passenger is not identified with the driver of the vehicle in which he is riding, and is not prevented from recovering of the owner of the other vehicle damages for injuries sustained by the collision.

Contributory negligence will not avail as a defense when the act charged to be such negligence was the result of tremor and excitement produced by the defendant's misconduct.

Damages cannot be increased in favor of the appellee if he fails to answer the appeal and pray therein for such increase. A request for increase in the brief will not suffice.

L. Holzab vs. Railroad Company et al., p. 185.

He who is in fault and sues for damages resulting from that fault, cannot recover for the injuries inflicted on him, although the perpetrator of them was not justified in law in his own conduct.

In a civil suit for damages for injuries caused by the defendant's shooting the plaintiff, evidence of threats of the plaintiff that he intended to do violence to the defendant, and of their communication to the defendant prior to the shooting, is admissible to show the impression made on the defendant's mind by the communication.

In such suit the indictment and verdict in a criminal prosecution of the defendant for the offense of shooting the plaintiff are admissible in evidence, not as conslusive of the plaintiff's right or want of right to recover, but as proper to be considered by the jury in determining the issue before them.

S. M. Bankston vs. C. Folks, et al., p. 267.

The owner of a building is responsible for personal injury sustained by the fall of part of it, when the accident is the result of his neglect to repair, or of a vice in the original construction.

Ignorance of the condition of the building, or the circumstance that it could not be easily detected, is not exculpatory. Notice is not required as a condition precedent for the recovery of damages.

J. Barnes vs. O. Beirne, p. 280.

The general rule governing the measure of damages in actions for tortious conversion the value of the property converted with interest.

The rule is subject to exceptions where the conversion is accompanied by violence or personal outrage, and perhaps where other particular damage is shown to have been clearly and directly occasioned by the wrongful act.

DAMAGES—Continued.

But in this case we see no reason to disturb the verdict of the jury, which applied the general rule.

D. H. Chamberlain vs. R. Worrell, p. 347.

The dismissal of an injunction suit on an exception is equivalent in law to a judgment decreeing the injunction to have been wrongfully obtained.

An action in damages following such a judgment, by the defendants in the injunction suit, involves but one question, and that is the quantum of damages to be allowed.

Carondelet Canal Co. et al. vs. Otto Touche et al., p. 388.

In absence of any allegation or proof that defendant's railroad is improperly constructed or conducted, or uses defective machinery, or, in any way, occasions injury not incident to the prudent and lawful exercise of its right, plaintiff is not entitled to the injunction or damages claimed.

An action of damages will not lie for merely consequential injuries resulting from the pursuit of a business and exercise of rights, lawful in themselves, when they are exercised with prudence and caution and in a manner to cause no unnecessary injury. Such inconveniences or injuries must be borne as the tribute of individual inconvenience to the general good.

Article 156 of the present Constitution is not applicable to this case.

A. Hill vs. Railroad Company, p. 599.

A railroad company is responsible in damages for injuries sustained by a person who is run over by one of its engines at one of its crossings on the street of a city, when it is shown that the engine was being driven at a rate of speed unusual in a depot yard, and beyond the limits of speed allowed under its own regulations, and that no signals by either whistle or bell was given of the approach of the engine.

A verdict of the jury allowing $10,000 damages for injuries caused by such an accident to a boy who lost an arm thereby, and who belongs to a laboring family, will not be disturbed on appeal. The allowance is not excessive.

Ketchum vs. Railroad Company, p. 777.

An action for damages resulting from the *passive* violation of a commutative contract, or one coutaining mutual stipulations and covenants between the parties, must be preceded by putting the obligor *in mora*, as a condition thereto.

The want or failure of the plaintiff to put him *in mora* does not oblige

DAMAGES—Continued.

defendant to except or specially deny that fact. It is the duty of the plaintiff to allege and prove it, else he cannot recover.

P. C. Livingston vs. P. Scully, p. 781.

Where the defendant in an attachment claims damages for the illegal issuing of the writ, one item of which is the alleged sacrifice of his goods seized and sold thereunder, and it appears that a low appraisement of the goods was procured by his own contrivance, and he was himself the purchaser of the goods at the sheriff's sale through a person interposed, and also concealed a part of the goods whilst under seizure which, in consequence, were not included in the sale, such facts deprived defendant of all right to complain.

Vale & Bowling vs. H. Routh, p. 894.

DIVORCE.

In an action for divorce predicated on a previous judgment of separation from bed and board, rendered one year previously, it is incumbent on the plaintiff to allege and to prove that in the mean time no reconciliation had taken place.

The failure to make such proof is fatal to plaintiff's case.

He must make proof of all elements imposed as conditions precedent to the judgment which he seeks to obtain.

J. Von Hoven vs. His Wife, p. 904.

DONATIONS INTER VIVOS.

A donation *inter vivos* duly accepted by the donee need not be accompanied by any other delivery.

A person who is alleged to be too ignorant of the English language to understand the meaning of an act of donation drawn in that language will be held bound by such an act, on proof that she understood the English language sufficiently well to dictate a will in that language. *Rauxet vs. Rauxet*, p. 669.

DONATIONS MORTIS CAUSA.

A testamentary disposition by which the testatar bequeaths all his property to his grand children, on condition that the legacy should remain under the administration of his testamentary executor until the legatees shall have reached the age of majority, does not create a *fidei commissum*, and has not the character of a condition which is impossible or reprobated by law. Under such a disposition the executor is not made a legatee with instruction to preserve for and turn over the property to another person.

A disposition whereby the testator bequeaths his whole property to his minor grand-children, on condition of their reaching the age of

DONATIONS MORTIS CAUSA—Continued.

majority, but that in default thereof, the property shall pass to certain designated charitable institutions, is not amenable to the objection that it is a substitution as prohibited by the civil code.

That feature of a will presents a double institution of heirs depending upon a suspensive condition, but not a double testamentary disposition of the same property, first in favor of one person, and at his death to another person. In this case if the legacy ever vests in the grandchildren, it cannot never reach the asylums, under the effect of the will.

Legatees, whether of age or under age, cannot accept a testamentary succession in part or on conditions different from those imposed by the testator. *Succession of Jacob Strauss, p.* 55.

Every disposition by which the donee or the legatee is charged to preserve for or to return to a third person is null; though a disposition by which a third person is called to take the gift in case the donee does not take it is valid; and so is a disposition by which the usufruct is given to one and the naked property to another.

The intention of the testator must principally be endeavored to be ascertained without departing from the proper signification of the terms of the testament, and same must be understood in the sense in which it can have effect rather than that in which it can have none. The intention of the testator must prevail over the gram matical meaning of the words employed in the testament, if from other dispositions contained therein or other words employed, it is manifest that he had another thought than that the terms employed in a particular disposition would otherwise convey.

"Legacies to pious uses" are those which are destined to some work of piety, or object of charity, and are highly favored by the law, on account of their motives for sacred uses and their advantage to the public weal.

Williams vs. Lodge Masons of Monroe, p. 620.

EVIDENCE.

Where a man's wife has an interest in a suit, and where the husband has no separate interest therein, the latter cannot testify.

R. Beltran vs. C. Gauthreaux et als., p. 106.

A wife cannot be a witness in her suit against her husband for dissolution of the community, separation of property, and the recovery of her moneyed claim against him. The prohibition is not personal to the husband, and cannot be waived by him. It is founded upon public policy and considerations of social order and is peremptory. *A. Cooley vs. B. C. Cooley, p.* 195.

EVIDENCE—Continued.

Parol testimony is admissible to show the real consideration of a contract evidenced by an authentic act, when the same is not expressed or described therein. The mortgagor who acknowledges an indebtedness as the foundation of the mortgage, when the act makes no mention of the source or origin of the debt, can have recourse to parol evidence to show the consideration of the debt or principal obligation, as a necessary step to establish the subsequent extinction or satisfaction of the debt.

The reason of the rule is that the evidence is admissible, not to vary or contradict the act, but to perfect it by supplementing omitted information.

A party who allows his former attorney to give evidence of matters confided to him by the client, without objection, will be presumed to have given his consent thereto, as provided for in Article 2283, C. C. *L. Dickson vs. Clerk et al., p.* 736.

The rule with regard to the books of a merchant being inadmissible in his favor, does not apply to those of corporations.

The testimony of witnesses on a former trial of same suit, may be used by either party on a second or subsequent trial thereof, if the witnesses are dead or, for other cause, cannot be then produced.

This rule is applicable to evidence offered on such former trial and admitted without objection, in pursuance of a previous agreement of parties, when that rejection of same would occasion the party offering it either injury or surprise.

Commissioners, etc., vs. Converse et als., p. 871.

ESTOPPEL.

A plea of estoppel cannot be maintained where it appears that the party against whom the plea is directed was ignorant of the true facts relating to the matter which formed the subject of the plea. Watkins vs. Cawthorn, 33 Ann. 1194.

A party is not estopped from prosecuting a claim because the same claim was urged in a previous suit on which he took, seasonably, a voluntary non-suit.

Carroll et al. vs. Cockerham, et al., p. 813.

EXECUTORY PROCESS.

Paragraph 4 of art. 739 of the Code of Practice, which empowers a seized debtor to arrest an executory process for the reason "that time has been granted him for paying the debt, although this circumstance be not mentioned in the contract" has reference to, and contemplates only, an agreement made since the execution of the

EXECUTORY PROCESS—Continued.

contract and not before. It may be enforced if made part of the contract as a suspensive condition depending upon the happening of an uncertain future event; but not when claimed to have been made before the contract.

Such a previous stipulation, when not included in the contract, will be deemed as having been formally abandoned by the contradicting parties. *Mortgage Co. vs. Mrs. Ralston*, p. 593.

Under the Act of April, 1853, and the Constitution of 1864, the clerk had no authority to grant an order of seizure and sale.

Mrs. Davie vs. Mrs. Scriber et al., p. 654.

Where defendant in executory process enjoins the enforcement or negotiable mortgage notes held by a third person who acquired before maturity, on the grounds of payment and compensation between the maker and the original payee of the notes, alleging simulation and fraud in the title of the transferee, failure to establish such simulation and fraud destroys the foundation of the case. *Flower, Adm., vs. Mrs. Noble, etc.*, p. 938.

GRAND JURY.

Criminal courts have no authority to examine members of the grand jury as witnesses concerning proceedings which may have taken place in their room or during their deliberations.

There is no law which prescribes the *quantum* of evidence on which grand juries must rest their conclusions in returning indictments.

Their findings amount at most to accusations, and in their conclusions they are beyond the control of the courts.

The State of Louisiana vs. Lewis, p. 680.

HABEAS CORPUS.

The Supreme Court has no original jurisdiction in *habeas corpus* cases, which do not come within the provisions of article 89 of the Constitution. *In the Matter of William Ross*, p. 523.

HOMESTEAD.

Where at the moment when the debtor acquired an immovable, there stood recorded against him in the parish a judgment, the judicial mortgage resulting from such record attached to the property *eo instanti* with the ownership, and he could not acquire a homestead in said property to the prejudice of such mortgage.

The jurisprudence is constant and uniform that privileges, mortgages and real rights attaching to property cannot be disturbed or affected by homestead rights which did not exist at the moment when they attached.

HOMESTEAD—Continued.

The rule covers judicial as well as conventional mortgages
John Taylor vs. Bertrand Saloy, p. 62.

A conventional mortgage granted by a debtor upon property which, at its date, constituted the duly registered homestead of the debtor, though inoperative while the conditions of the homestead exist, may be enforced against the property when the homestead therein has ceased by reason of the removal of the debtor and his family to another State. *J. Chaffe & Sons vs. McGehee & Co., p. 278.*

Under the amendment of Art. 81 of the Constitution of 1879, this Court has appellate jurisdiction of suits involving rights to homesteads, irrespective of the value of the property alleged to be exempt.

Homestead provisions of the Constitution of 1879, avail only those who register claims therefor, antecedent to contracting debts sought to be enforced against it.

A judgment liquidates, but does not create a debt. It recognizes existing, but confers no new or additional rights.

Property exempted from seizure and sale, under the provisions of the homestead law of 1865, is predial and not urban.

Laws conferring homestead rights must be strictly construed.
J. H. Kinder vs. Sheriff et al., p. 713.

HUSBAND AND WIFE.

A wife enjoining the seizure and sale of movables seized under executory process against her husband as part of the mortgaged property, on the double ground that they belong to her and were not covered by the mortgage, because not attached to the mortgaged property, has no interest in the last question, because, if they do not belong to her, it is not her concern whether they were covered by the mortgage and were properly seized or not; and if they do belong to her, it is of no consequence whether they were attached to the property or not. The question of title is the only material issue.

Although we have held that the agency of the husband is not incompatible with the wife's separate administration, yet such agency must be clear and certain, and the administration must be distinctly conducted in her name and for her account.

Under the circumstances of this case, where the husband conducted, as one plantation, three adjoining places, one belonging to his wife and the others to himself, carried on the whole business in his own name, shipped the crops, obtained advances and supplies, and received credits on his own account, such administration is that of the husband and the fruits belong to the community.

HUSBAND AND WIFE—Continued.

Movables on such places, destined to the use of the whole property, purchased during the existence of the community and found in the husband's possession, are presumed to belong to the community.

These presumptions can only be rebutted by clear evidence establishing that they were purchased by the wife with paraphernal funds under her separate administration and control.

The evidence in this case fails to establish the wife's title, and as she has no authority to vindicate rights appertaining to the community, her claim is rejected.

Mrs. J. Trezevant vs. Sheriff et al., p. 146.

A suit against a married woman should be brought against her and her husband.

It is only in case the husband is absent or refuses his authorization that the judge can validly authorize the wife to stand in judgment alone.

In this case, the husband was not sued and has not appeared. There being no allegation or pretense that he was absent or had refused, the judge's authorization was invalid.

The vice was not cured by going to trial without excepting on this ground. The objections to evidence on the ground that the wife was not legally authorized to stand in judgment should have been sustained.

Under Article 606 C. P., the judgment, however rendered, was subject to nullity. *Saunders et al. vs. S. E. Burns, p.* 367.

The forced heirs of a married woman have a legal right to sue the surviving husband for a specific amount of paraphernal funds of their deceased mother received by the father, if the latter has not been confirmed and qualified as their tutor during their minority. In such a case the father is their debtor under the rights of the mother, and they can enforce all her rights without recourse to an action for an account. *Richardson et al. vs. Richardson, p.* 657.

The dowry is given to the husband for him to *enjoy* the same so long as the marriage shall last. R. C. C. 2347.

With respect to the effects of the dowry, the *husband* is subject to all the obligations of the usufructuary. R. C. C. 2365, 549, 594.

If the dowry consist of immovables, or of *movables not valued by the marriage contract*, the husband or his heirs may be compelled to restore the same at the dissolution of the marriage. R. C. C. 2367.

At the dissolution of the marriage all effects which both husband and wife reciprocally possess, are *presumed* common effects, or gains,

HUSBAND AND WIFE—Continued.

unless it be satisfactorily shown which of such effects they brought in marriage or which have been given them separately, or which they have respectively inherited.

Succession of Eugene Breaux, p. 728.

A judgment of separation between husband and wife as to third persons, only proves *rem ipsam*. No legal presumption of its correctness arises from the mere signing the decree.

Where such judgment is charged fraudulent and simulated and proof has been administered going to sustain such charge, it is incumbent on those interested in maintaining such judgment, that its reality and the validity of its consideration should be established by evidence *aliunde*.

Where a husband makes a transfer to his wife without any valid consideration and such transfer exceeds the disposal portion of his estate, his forced heirs after his death may, by suit, demand that the transfer be annulled in excess of the disposable portion even though the property has passed into the hands of third persons, and can be brought back into the succession of the transferror or donor free from all charges created by the transferee or donee. C. C. 1516.

Contracts between husband and wife are restricted to the exceptions in C. C. 2446, and all those outside of the limits therein prescribed are null and void. *Carroll et al. vs. Cockerham et al., p.* 813.

INJUNCTION.

The codal provisions of our practice touching injunctions are broader and more comprehensive than the rule of the chancery courts and include causes for injunctions that would not be sanctioned in a common-law court. Differences in the manner of obtaining the writs under the two systems are not less manifest than the difference in their scope. Under our system when it has been judicially determined that the writ was rightfully issued, there can be no doubt that the party who has been injured by disobedience of it may recover all damages he has suffered thereby.

J. Levy vs. N. O. Water Works Company, p. 29.

District courts have no power to question the authority of mandates of this court, or to refuse to execute them; but the utmost effect which can be claimed for them, so far as their execution is concerned, is that they shall be executed according to law. When an application is made to restrain further proceedings in execution of

INJUNCTION—Continued.

a writ on the ground that the requirements of the law as to the mode of execution have been violated, the district court does not exceed its powers in granting such an injunction. When, thereafter, it has rendered a judgment dissolving the injunction, the party cast had the right to a suspensive appeal, and in granting the same the judge only performed his legal duty.

During the pendency of such appeal, the injunction operates as if never dissolved, and it is not the duty of the judge to proceed with the execution of a writ thus enjoined.

An application for mandamus directing him so to proceed cannot be allowed. *The State ex rel. Sentell vs. Judge, etc., p.* 31.

The dissolution of an injunction on bond is an exercise of the discretionary power vested expressly in the judge by the terms of the Code of Practice. When refused, a mandamus will not lie to compel a dissolution. The remedy is by appeal.

The State ex rel. Roth vs. Judge, etc., p. 49.

No injunction lies to restrain the enforcement of a municipal ordinance which has been abandoned and become inoperative, whether that fact is brought to the knowledge of the court of the first instance or on appeal.

R. H. Browne et al. vs. New Orleans et al., p. 517.

Injunction will not lie against a prospective nuisance, except in cases where its establishment will occasion imminent danger or irreparable injury, or at least where there is no question that the proposed erection will be a nuisance in the sense of the law.

Defendants having obtained permission from the city to erect a steam engine on their own premises, plaintiff, a neighbor, cannot enjoin them from such erection in advance, upon allegations of apprehended danger and injury, when the evidence leaves it doubtful whether such danger or injury will result from the erection in the mode proposed by defendants, and when, if they arise of a nature to justify legal redress, the remedy then afforded will be ample and sufficient to abate them.

It is not necessary to determine what amount or character of danger or injury would support plaintiff's right to judicial relief.

Mrs. Bell vs. Riggs & Bro., p. 555.

In executions under writs of *fi. fa.*, excessive seizure is not a legal ground of injunction of the execution; the remedy is to apply for reduction of seizure under art. 642, Code of Practice.

INJUNCTION—Continued.

Parties who abuse the writ of injunction to stay execution of moneyed judgments against them, should be mulcted in damages.

Mrs. Lambeth vs. Sentell et als., p. 691.

The appointment of plaintiff as sexton of St. Patrick's cemeteries was a contract for personal service. The position has no feature of a franchise or public office, and even if assimilated to a private office such as held by an officer of a corporation, those officers are ordinarily regarded as servants or agents and subject to discharge for cause.

Injunction is not allowed as a remedy to enforce, or prevent the breach of, contracts for personal service.

To authorize the application of injunction, in any case, to prevent the breach of a mere personal contract, the following are essential conditions: (1) that the injury apprehended should not be susceptible of adequate compensation in damages; (2) that the contract should be clearly established, its terms free from doubt, and plaintiff's construction of it clear and certain; (3) that plaintiff should show complete performance on his part of his obligations under the contract.

These conditions are not established to our satisfaction by the evidence in this case and, without precluding the parties as to any questions in a proper action, the injunction is set aside and the parties are remitted to ordinary remedies.

J. J. Healy vs. Rev. Allen, p. 867.

Mandamus will not lie to compel a judge of the district court to grant an injunction which he has refused, when the case for injunction does not fall within any specific provision of law, but is based only on the general provision of Art. 303, C. C., authorizing judges to grant injunctions when necessary "to prevent any injurious act." Such applications are addressed to the discretion of the judge, which is not subject to control under our supervisory jurisdiction. *The State ex rel. Savage vs. Judge, etc., p.* 916.

The judgment rendered on injunction by a court of competent jurisdiction must be held as having disposed of all the points of law involved in the alleged illegality of the execution, especially when it appears that there had been a regular trial, in which all the rules of legal procedure had been observed. Hence, such a judgment cannot be reviewed otherwise than on appeal.

The State ex rel. Gooch vs. Justice of the Peace, p. 968.

INSOLVENCY.

In insolvent proceedings, where no objection is made to the votes of creditors before the notary holding the meeting or within ten days after the filing of the proces verbal, objections based on the informality or insufficiency of the affidavits to the debts made before the notary cannot, thereafter, be urged.

A surety or accommodation maker or endorser of a note, only becomes a creditor of his principal when he has paid the debt and, until such payment, he is not entitled to vote as a creditor in the insolvent proceedings of his principal.

T. O. Terry & Sons vs. Their Creditors, p. 15.

Section 1808, R. S., strikes with nullity all contracts which an insolvent enters into with intent or purpose to give one creditor a preference over another, if made within three months next preceding his failure. The word "failure" in this statute means judicial failure, or a failure declared by a judgment or order insolvent proceeding.

Seixas, Syndic, vs. Citizens' Bank, p. 424.

INSURANCE.

Where an insurer knows that the premises may be used for storing cotton, and inserts this written clause: "It is understood that when the above building is used as a warehouse the rate will be changed," the storing of cotton will not avoid or forfeit the policy. On the contrary, these words indicate that the policy is to remain in force, for unless it remained in force the rate could not be changed. In such case, even conceding that a right to "change" meant a right to "increase," it was a right reserved to insurer, who alone could fix rates. The insurer could demand a higher rate, or he could cancel the policy where a right to cancel is provided. But, under the facts of this case, where the insurer did neither, the policy remained in force and the plaintiff must recover. *S. B. Steers etc., vs. Insurance Co., p.* 952.

JUDGMENT.

All issues presented in a cause by the pleadings, on which evidence is introduced on trial, will be considered as disposed of by a final judgment, although the latter be silent on some of the issues in the case. *Rauxet vs. Rauxet, p.* 669.

A judgment rendered by a court of competent jurisdiction imparts absolute verity, and has the force of the thing adjudged until set aside in a direct action of nullity; it cannot be attacked collaterally. *Mrs. Kent vs. Brown & Learned, p.* 802.

The State having once taken proceedings for the forfeiture of a bail

JUDGMENT—Continued.

bond in a criminal case, and having obtained a judgment against the parties, which is final and has never been, in any mode, annulled, avoided or reversed, cannot recover another and new judgment on the same bond against the same parties.

The State of Louisiana vs. C. Harrison, p. 299.

JUDICIAL SALES.

There is nothing reprehensible in an agreement by which a party contemplating purchase at a judicial sale for cash, agrees with a third person that, if he acquires, he will sell to the latter on terms of credit—in absence at least of any evidence that the third person intended to bid at the sale or that the agreement was made with the purpose of preventing competition.

R. Beltran vs. C. Gauthreaux, et als., p. 106.

A judicial sale made without an order of court, or in contravention of the terms of such an order where one exists, is an absolute nullity, and no resort to a direct order is necessary to have it declared.

And even where the nullity is relative only, if asserted by reconventional demand in the answer, and all the parties in interest with respect to the sale are before the court, such nullity may be determined and decreed.

A judgment or judicial order must be construed in connection with the averments and prayer of the petition therefor. And where the averments of a petition presented by the surviving partner of a community administering the succession of the deceased spouse, are to the effect that a sale of the community property is essential to pay the community debts, and the prayer of the petition is in conformity therewith, the order of sale rendered on such petition will be construed to require the sale of an immovable belonging to the community in its entirety and to confer no authority to sell only the undivided interest of the deceased therein ; and a sale of such interest would be null.

Succession of Mrs. L. E. Bright, p. 141.

The purchaser of immovable property of an insolvent succession sold under executory process cannot retain the balance of the purchase price after satisfying the claim of the seizing and ranking mortgage creditors, unless there are special mortgages of inferior rank existing against the property, or unless he is threatened with eviction by the holders of general mortgages affecting the proper-

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JUDICIAL SALES—Continued.

ty. The right to retain said balance cannot be exercised even if there are special mortgages when it appears that the holders of the same have asked to be paid out of the proceeds of the sale, and when similar proceedings have been resorted to by all the mortgage creditors, who have thus all transferred their rights from the thing to the proceeds.

In such a condition of things the funds must be turned over to the administrator of the succession.

J. Tessier vs. L. Bourgeois, p. 256.

In an action by a judgment debtor to annul a sheriff's sale of his property seized under a judgment against him, the adjudicatee cannot question his original title, because that would destroy the sole foundation of his own.

When property has been sold in execution of a judgment during the pendency of a devolutive appeal, the subsequent reduction of the amount of the judgment by the appellate court has no effect upon the validity of the title acquired at the sale, even if the purchaser be the judgment creditor. The latter is only bound to restore the excess of the price which may have been applied to her original judgment.

The non-payment of accrued taxes does not destroy the validity of the adjudication.

The rule of Art. 684, C. P., prohibiting sale unless the price bid exceed prior mortgages and privileges, applies exclusively to special or conventional mortgages.

The mortgage certificate in this case showed no conventional mortgages or privileges exceeding the bid.

The registry of seizure of immovable property in New Orleans, under Act 189 of 1857, operates merely as a substitute for actual seizure and possession by the sheriff, and has nothing to do with the establishment or notice of a privilege. The privilege resulting from such seizure arises not from its registry, but from its actual continuance as a subsisting seizure.

When a prior special mortgage has been cancelled and erased from the records prior to the sale, in pursuance of a final judgment to that effect by a court of competent jurisdiction, and does not appear on the mortgage certificate read at the sale, the judgment debtor cannot, long afterwards, claim the nullity of the sale on the ground that the price bid did not exceed the amount of such cancelled mortgage. *J. Pasley vs. A. McConnell et al., p.* 470.

JUDICIAL SALES—Continued.

A judge has at all times the right, upon proper proceedings and proof, to correct clerical errors that occur in interlocutory orders, or chambers decrees he has granted, on giving due notice to interested parties.

To relieve a purchaser of real property from compliance with the terms of his bid at a judicial sale, he must show that there is a cloud upon the *title of the vendor;* mere irregularities in proceedings in sale will not avail him, as he is protected by the decree under which the sale is made, and his right to restitution, in case of loss or injury thereto.

Successions of M. A. and J. B. Byrne, p. 518.

An adjudicatee may be compelled to comply with the terms of a sale when the title tendered is such as he is bound to accept.

Such adjudicatee cannot urge, as a defense, that the title offered him by the owner was made to such owner by an agent whose procuration was, at the time, revoked by the *notorious* insanity and seclusion of the principal, *unless* the mental derangement was such as would have justified interdiction, and the purchaser was aware of the incapacity.

Where the purchaser bought in good faith and paid a fair price, which enured to the benefit of the principal, and where the principal or his curator, after his interdiction, could not successfully claim the nullity of the transaction, or could not be made to take back the property, the sale will not be vitiated.

N. B. Phelps vs. A. Reinach, p. 547.

Want of notice of order of seizure and sale or of the seizure, where the defendant administrator has waived such notice, comes within the irregularities referred to in C. C. article 3543, and are cured by the prescription of five years, which runs against minors.

A purchaser at a judicial sale under an order of seizure and sale of a court of competent jurisdiction, in a proceeding against the legal representative of the person in whose sole name the property stood of record, without knowledge, express or implied, of the existence of any claim of a deceased wife in community, is a purchaser in good faith, and although the heirs of such deceased wife may recover her share of the property, they are entitled to revenues only from the date of their claim, and must reimburse the expenditures of defendants, such as taxes.

Oriol, Tutor, vs. Moss et al., p. 770.

JURISDICTION.

A suit enjoining the collection of taxes in amount less than two thousand dollars on the ground that the property has been sold at a probate sale and the inscription of the taxes has been erased and the lien and privilege for them has been transferred to the proceeds of sale, is not within the jurisdiction of the Supreme Court, and cannot be put within its jurisdiction by a letter from the appellee's attorney to the appellant's attorney, written after the appeal has been taken and perfected, informing him that the taxes due are really more than were injoined and that they exceed two thousand dollars.

If more taxes were due than were injoined there was no hindrance to the collection of the excess over those injoined.

J. C. Denis, President, etc., vs. Tax Collector, p. 39.

The decison of questions of jurisdiction belongs necessarily to the court before which they are raised, and its decision is final unless reversed by an appellate tribunal.

The State ex rel. Halphen vs. Judges, etc., p. 97.

When a tax payer enjoins the seizure and sale of his property for taxes, he occupies the position of a judgment debtor enjoining the execution of a judgment against himself; and the test of our jurisdiction is the amount of the taxes and not the value of the property. The Constitution does not vest this Court with jurisdiction, regardless of amount, of cases involving the legality of assessments, and we cannot assume it.

The ground of the injunction involving no question as to the legality or constitutionality of the tax, but assailing solely the legality of the assessment, the appeal is dismissed.

Henry C. Minor vs. Sheriff, etc., p. 98.

The Supreme Court has no jurisdiction over suit by mandamus to compel the clerk of a district court to give access to an employe of the police jury in his office for the purpose of transcribing mutilated archives, when the petition contains no moneyed demand, and the record fails to disclose any pecuniary interest exceeding $2000 in any of the parties to the suit.

Police Jury vs. W. Hubbs, Clerk, etc., p. 149.

The Supreme Court has no jurisdiction over tax suits regardless of the amount involved, unless the legality or constitutionality of the tax be in contestation.

Hence in a suit which presents the question of the legality of a tax,

JURISDICTION—Continued.

and in which the tax is resisted on the further grounds of illegality of the assessment and irregularities in the mode of levying and of collecting the tax, the court will entertain the appeal on one branch of the contestation, the illegality of the tax, and will ignore the appeal on the other branch of the case.

C. D. Favrot vs. Baton Rouge, p. 230.

A writ of prohibition will not issue to arrest the execution of a judgment of one of the courts of appeals, on the complaint of the party cast, on the ground of want of jurisdiction, unless it appears from the record that the court was absolutely without jurisdiction in the premises.

In an action of boundary between the owners of two contiguous estates, the test of jurisdiction is not in the value of either or both of the adjacent estates, but in the value of the strip of land included between the two contested lines; and if it appears that the value of such strip of land is in the sum of three hundred dollars, the jurisdiction of the cause on appeal is in the court of appeals, and not in the Supreme Court. The case of Lombard vs. Belanger, 25 Ann. 311, affirmed.

The State ex rel. Levet vs. Lapeyrollerie, p. 264.

When a plea to the jurisdiction *ratione personæ* has been filed in the District Court and referred to and tried with the merits, and judgment has been rendered sustaining the plea and dismissing the demand, the party injured has the right to appeal from such judgment to the proper appellate tribunal. Such appeal vests the latter with full jurisdiction over the case and over all questions of law and fact involved therein, including that of the jurisdiction of the District Court. In determining such question and reversing the judgment appealed from, the judges of said court do not transcend the bounds of their jurisdiction, and the application for the writ of prohibition has no foundation.

The State ex rel. Goodwin vs. Judges, etc., p. 270.

The courts of this State have no jurisdiction over a suit by an individual, the object of which is to enforce specific performance of a contract with the State, where the latter is not a party to the suit, has not consented to be sued and is not represented therein by a State functionary duly empowered to do so, at the bringing of the action.

The power conferred to represent may be recalled. The withdrawal thereof leaves the once constituted agent without authority to further represent.

The State ex rel. Guaranty Co. vs. Auditor, p. 337.

JURISDICTION—Continued.

This Court has not jurisdiction of a criminal cause when the fine imposed is three hundred dollars. It must exceed that sum.

If the costs added to the fine make an aggregate of over three hundred dollars, that will not confer jurisdiction. The *fine* must exceed that sum by the express letter of the Constitution.

The State vs. W. H. Chapman, p. 348.

In the exercise of its supervisory jurisdiction the Supreme Court cannot entertain a complaint against an inferior court, which practically involves the correctness of a judgment rendered by said court, which had unquestioned jurisdiction *ratione materiæ et personæ* over the cause, or the correctness of any of its rulings in such a cause, when it appears that the rules of law and practice governing the trial of causes have been observed.

Such an attempt would be an unjustifiable assumption of jurisdiction and powers not granted by the Constitution or sanctioned by law or jurisprudence.

The State ex rel. Wood Bros. vs. Judge, etc., p. 377.

The jurisdiction of this Court must be tested by the pecuniary amount in dispute, as shown by the pleadings and as appearing from the nature of the action, and not by the jurisdictional allegations, or by the affidavit of the appellant.

The substantive allegations in the pleadings, not the alleged opinion of litigants, will be considered in all questions of jurisdiction.

No allegation and no affidavit can create an appealable amount of interest in a litigation which from its very nature and essence cannot involve a pecuniary amount in dispute equal to the lower limit of the jurisdiction of the Supreme Court.

Th. Buddig vs. Th. Baldwin, p. 394.

In an action by a judgment creditor to have the purchase of property declared simulated and to be in reality for account of the debtor, the value of the property, and not the amount of the judgment, is the matter in dispute. 27 Ann. 186.

Godshaw & Plant, vs. Judges, etc., p. 643.

Where the execution of a judgment of an inferior court is sought to be prevented by means of a writ of prohibition on the ground of the want of jurisdiction in the court rendering the judgment, the circumstance that such court had overruled the plea to its jurisdiction, and assumed jurisdiction of the cause, does not debar this Court from reviewing the question of said court's jurisdiction and its ruling thereon. In fact, before that court took jurisdiction of the cause, an application to this Court for its interference would be premature. *The State ex rel. Levet vs. Lapeyrollerie, p.* 912.

JUSTICES OF THE PEACE.

A justice of the peace has no jurisdiction *ratione materiæ* to entertain a suit, in which damages actually suffered, amounting to $90, are demanded, and in which defendants are enjoined from claiming and collecting daily charges for the use of a market stall, and from closing same and keeping it closed, and from ever interfering with him in his business." 37 Ann. 583, State ex rel. New Orleans vs. Judge; 33 Ann. 146, State ex rel. Frederick vs. Skinner.

Chas. Clerc vs. Mayor, etc., p. 732.

LAWS.

That portion of Act No. 74 of 1880, which places the unpaid salaries of school teachers, subsequent to 1872 and prior to January 1, 1880, on the same footing with the valid indebtedness of the city of New Orleans, is unconstitutional and therefore null.

C. Labatt vs. New Orleans, p. 283.

New legislation cannot be engrafted upon different and distinct subject matter by way of amendment without mention being made of the object in the title; but any subject matter that is germane to the original text may be incorporated without being amenable to this objection, if it be stated in the title what particular law is to be thereby amended or reversed.

Williams vs. Lodge Masons of Monroe, p. 620.

LEASE.

Failure of lessor to maintain the thing leased in a condition such as to serve the use for which it is hired, and to make repairs necessary to that end, while it may give the lessee the right to claim a dissolution, or to claim damages resulting from such failure, does not confer upon him the right to continue to use and occupy the premises without compensation; and if, notwithstanding a suit to dissolve, he fails to restore or offer to restore the thing leased to the lessor and continues to use and occupy it, he is liable for the rent during the term of such occupancy.

Where the lessee fails to pay the rent due under such circumstances, the writ of provisional seizure is a lawful remedy, and damages cannot be recovered for its issuance.

Mrs. Mulhaupt vs. W. Enders, 744.

Pending an action involving the title of immovable property, which is rented under a previous contract of lease, the tenant, from whom the rents are adversely claimed by the parties, may be authorized to deposit the same as they mature, subject to the final decision of the cause, in a bank selected as judicial depository.

Clark & Meader vs. Sheriff et als., p. 862.

LITIGIOUS RIGHTS.

The last article of the Code defining litigious rights to be those which cannot be exercised without undergoing a lawsuit, does not apply to those litigious rights from which one can be released by paying the real price of the transfer under Art. 2652, because the next article particularly defines this latter right to be litigious whenever there exists a suit and contestation on it. These two articles regulate a particular kind of litigious right, and there must be an existing suit for the enforcement of it, or release cannot be had by paying the price of its transfer.

The fact that a suit may be necessary to enforce a claim does not make the claim a litigious right.

T. McDougall vs. J. Monlezun et als., p. 223.

LUNATICS.

Proceedings under Sec. 1768, R. S., relative to the confinement of lunatics and insane persons in the State insane asylum, are not violative of the constitutional provision, (Art. 6), which requires "*due process of law*," previous to deprivation of life, liberty or property.

A judgment of interdiction is not a condition precedent essentially required for proceedings under Sec. 1768, R. S.

In the Matter of William Ross, p. 523.

MARRIAGE

Persons legally married are, until a dissolution of marriage, incapable of contracting another.

Hence a marriage attempted by the wife of a previous marriage, before its dissolution by law or by the legal presumption of the death of her husband, is not valid. In a suit intended to enforce legal effects of such a marriage against the pretended second husband the latter as defendant can plead the nullity of the marriage by way of exception and without resorting to a direct action. No legal effects can result from such a union.

The term of absence without news of either of the spouses, which gives a sufficient cause to the other to contract another marriage is ten years.

An absence of four years, unaccompanied by any circumstances tending to justify the belief that the absent husband is dead, is not sufficient to create the legal presumption of the validity of a second marriage contracted by the wife.

The burden of proof in such a case is on the wife who seeks to enforce the legality of her second marriage, to show that the absent husband was dead at the time that she attempted to contract another marriage. *Mrs. C. McCaffrey vs. J. H. Benson, p.* 198.

MARRIED WOMEN.

In a suit against a married woman, appertaining to her separate property-rights, demands respecting the community cannot be determined.

A judgment in a previous suit against her by some plaintiff, annulling a sale made to her ostensibly of that part of the property claimed in the present suit by plaintiff, and "putting the parties in the condition they stood prior to the transaction," forms *res adjudicata* with respect to the parties, and will protect a title she may receive under judgment of partition.

Heirs of Mason vs. Mrs. Layton et al., p. 675.

MANDAMUS.

A mandamus properly lies to compel the City Council to provide for the payment of an acknowledged claim against the city. If such mandamus is disobeyed, the judge issuing it can punish for contempt those guilty of the disobedience.

In such case the process for contempt should not be directed against the entire City Council but against those only who have refused to obey the writ.

Disobedience to a mandamus, ordering the City Council to provide for the payment of a city debt, is shown by those members of the council who, after the debt is budgeted on the report of the finance committee, vote against an ordinance for its payment.

The State ex rel. Bauman et al. vs. Judge, etc., p. 43.

Mandamus will not lie to compel an inferior judge to proceed to the trial of an appealable case which he has dismissed by sustaining a plea to his jurisdiction. The remedy is by appeal.

Our jurisprudence would be revolutionized if we should hold that every right that has heretofore been enforced by appeal, and every wrong that has heretofore been redressed by appeal, may now be enforced or redressed by mandamus whenever the necessities of a suitor appears to require or invite it.

The State ex rel. Halphen vs. Judges, etc., p. 97.

A *mandamus* will issue to compel a railroad company to allow the transfer on its books of shares in the name of the relator, when it is established that a party, to whom the company says the stock belongs in part, has been finally adjudged not to have any interest therein.

The judgment, although foreign, having acquired the force of *res judicata*, must be given that effect. On a charge that it is erroneous, this Court will not go behind it to test its correctness.

The State ex rel. Plaisent vs. Railroad Company, p. 312.

MANDAMUS—Continued.

Ejectment proceedings are summary in character.

A prayer that the defendant be *cited* is not a conversion of such proceedings into ordinary ones. The word used is that found in the statute.

Mandamus is the appropriate remedy to compel the trial as *summary*, of such suit, where the district judge has on that account ruled as a question of practice or procedure, that it has ceased to be such and had been converted into an *ordinary* action.

The State ex rel. Citizens' Bank vs. Judge, etc., p. 499.

A judgment of this Court, the execution of which is made to depend upon a protestative condition, and dependent on an event which it is in the power of one of the parties to bring about or to hinder, cannot be executed until it is first determined whether the condition or event has transpired within the time fixed and limited in the decree.

The ascertainment of the fact whether the condition on which the execution of said judgment is made to depend, is a judicial one, and cannot be ascertained or determined in a mandamus proceeding.

One having resorted to a judicial proceeding by rule to show cause taken on the interested party, who joined issue by answer, and the introduction of proof with regard to the performance of said condition, cannot, after an adverse judgment thereon, withdraw therefrom and resort to a mandamus to obtain his desired relief.

The State ex rel. Hepting vs. Judge, etc., p. 558.

A mandamus lies to compel the performance of duties purely ministerial in their nature and so clear and specific that no element of discretion is left in their performance.

It will lie to judges of inferior courts, in order to require them to do justice according to the powers of their office, whenever they have delayed acting; and to prevent a denial of justice; and when the law has assigned no relief by the ordinary means; and when justice and reason require that some mode should exist of redressing a wrong or an abuse of any nature whatever.

The writ will issue to compel a district judge to grant an injunction restraining a tax collector from collecting the tax of fifty cents per bale on cotton within the Fifth Levee District, authorized by Act 44 of 1886, until its alleged unconstitutionality can be judicially determined.

The State ex rel Gaynor vs. Judge, etc., p. 923.

MINORS.

Abstracts of inventories recorded to preserve the mortgage of minors are not evidence of the validity of the minor's claim, much less are they conclusive against the tutor as to the amount appearing on them to be due the minor.

And as the general mortgage created by recording these abstracts is not fixed in amount by such recording merely, so a special mortgage on a particular piece of property, executed under permission of the court to replace that general mortgage, does not irrevocably fix the sum stated therein as the sum secured to be the sum due the minor.

And hence it follows that where a special mortgage has been given by a natural tutor to secure to his son and ward the one-half of the community property as it appears on the inventory without deduction of the community debts, and in subsequent proceedings in settlement of the succession it is claimed that the sum secured in the mortgage is reducible by the debts that have been paid, evidence of such payment and of the condition of the succession when it fell to the heir is admissible in order to ascertain what was the actual value of the succession at that time.

This does not abrade the general doctrine that protects the sanctity of judicial declarations and authentic acts. These acts of a tutor are required to be done in certain contingencies to accomplish certain purposes, and the law that required the performance of them fixes their meaning and limits their effect and consequence.

Succession of R. F. Theurer, p. 510.

A consent to take up a case for trial that has been fixed for a different day, is not such a consent as will vitiate a judgment, although a minor be a party thereto.

Members of a family meeting have the right to waive the three days delay allowed by law for their citation, and convene at an earlier date. R. C. C. 285; 9 Ann. 560, Gasson vs. Palfrey.

Successions of M. A. and J. B. Byrne, p. 518.

The legal effects of a purchase by the surviving father or mother of the community property at a sale thereof at public auction to pay debts, are not the same as a purchase by the same party of said community property at the price of estimation, on the advice of a family meeting, under Article 343 C. C. Under the latter sale, the property remains mortgaged to secure the price; while under the former, no such mortgage is recognized by law. The only mortgage is in favor of minors on account of the tutorship, but not for the usufruct. *R. L. Cochran vs. Mrs. Violet et al., p.* 525.

MINORS—Continued.

When the legal mortgage of a minor on the property of his tutor was originally inscribed after the majority of the former, failure to reinscribe within ten years operates the peremption of the mortgage, which cannot thereafter be enforced against property formerly belonging to the tutor, in the hands of a third possessor.

J. H. Lusk vs. T. J. Powell, p. 616.

In case of conflict between provisions of the Civil Code and those of the Code of Practice on questions of practice, the provisions of the latter Code must prevail.

Under Article 958, Code of Practice, the office or function of curator *ad litem* has no longer any existence in law.

When laws *in pari materia* are to be interpreted, that construction is to be preferred which will give effect to all their provisions.

Hence, article 958, C. P., in abolishing the function of *curator ad litem*, does not abrogate any of the rights vested in emancipated minors by sec. 2, chap. 2, of the Civil Code on the subject of emancipation.

Their right to appear in courts in order to enforce such rights, without assistance, is therefore maintained.

Richardson vs. Richardson, p. 639.

MORTGAGE.

Article 3304 C. C., making valid a mortgage granted on the property of another when the mortgagor subsequently acquires the ownership, requires three elements to give it application, viz:

1. "A person contracting an obligation towards another," *i. e.*, becoming his *debtor;*
2. That such *debtor* should have granted a mortgage on property of which he was not the owner;
3. That such *debtor* should "subsequently acquire the ownership of the property."

It has no application when the person who subsequently acquired the property had granted a mortgage as agent, and in the name of the then owner, without any personal guarantee, and with full exhibition of his powers embodied in authentic act of procuration referred to in the act of mortgage.

Although it was judicially determined that the procuration did not authorize the mortgage and that, therefore, it was not binding on the principal, yet, under the express terms of the Code the mandatory, having exhibited the power of attorney under which he acted, incurred no responsibility. C. C. arts. 3012 and 3013.

Hence, not having contracted a debt by virtue of the act, his subse-

MORTGAGE—Continued.

quent acquisition of the property did not validate the mortgage. The rights of the commissioners herein being based exclusively on the bank's claim of mortgage, and that thus falling to the ground, they have no rights or interest to set up the alleged nullities of the judicial sale attacked.

L. L. Levy vs. Mrs. Ada Lane et al., p. 252.

All things which the owner of a tract of land has placed upon it for its service and improvement, such as working animals, implements of husbandry, machinery and other appurtenances, are immovable by destination, and are covered by a pre-existing mortgage which attaches to the realty.

But the effect of the mortgage on such movables is maintained only as long as the condition of immovable by destination continues, hence the owner may remove them from the mortgaged premises and if the removal is done in good faith, and if by means of a sale, it is followed by delivery to the purchaser equally in good faith, the effect of the mortgage thereon is destroyed.

Hence, in such a case, the creditor cannot pursue such things in the hands of a third party, purchaser and possessor in good faith, so as to subject them to his mortgage.

But his right to prevent, by legal proceedings, the removal of such movables from the mortgaged premises, or to pursue them in the hands of a third possessor in bad faith, is fully recognized.

M. Weil vs. J. Lapeyre et al., p. 303.

When a third person, under color of a pretended sale of immovables by destination subject at the time to a mortgage, unaccompanied by delivery and removal, subsequently, removes them fraudulently and sells and converts the price to his own use, the mortgagee, on establishing the fraud, the insolvency of the debtor and the insufficiency of the remaining mortgaged property to pay the debt, may recover from the third person the price received by him for the property fraudulently removed.

This case compared Weil vs. Lapeyre recently decided and shown to be in accordance with the principles there announced.

Mechanics and Traders' Insurance Company vs. Gerson et als. p. 310.

When property, part of which is subject to a mortgage, is sold by th owner, and the purchaser, in part payment of the price, assumes payment of the mortgage debt, the latter, as part of the price, is secured by vendor's privilege on the whole property sold; but

MORTGAGE—Continued.

the mortgage remains confined to the part originally subject thereto.

When in proceeding by executory process to enforce the mortgage alone, without reference to the privilege, an order of seizure and sale issues against the whole property, it embraces property not covered by the mortgage, and is, therefore, error and the order must be set aside on appeal.

Citizens' Bank vs. Cuny, et al., p. 360.

An instrument, executed in the State of Alabama and shown to be a mortgage in that State, will be treated as such by the courts oe Louisiana; but as the lands affected thereby are situated in Louisiana, its effect must be regulated by the laws of this State.

Under our laws, a mortgage does not, of itself, operate a divestiture of title from the mortgagor to the mortgagee.

The mortgagor retains the title and under it will defeat claims of ownership set up by the mortgagee, as resulting from the mortgage.

A common-law mortgage is not similar to a *vente a réméré*, under the Civil Code of Louisiana.

C. B. Miller vs. Shotwell et al., p. 890.

MUNICIPAL CORPORATIONS.

A municipal corporation has no right to enforce obedience to the ordinances which it has the power to pass, by fine or imprisonment or other penalty, unless that right has been unquestionably conferred by the lawgiver. The infliction of punishment for the commission or omission of the act declared to be an offense, is a prerogative which, as a rule, appertains exclusively to the sovereign.

The city of New Orleans has no right to inflict a fine and, in default of payment, imprisonment for non-compliance with an ordinance relative to the establishment of a uniform grade for all sidewalks within corporate limits. That right was not delegated to it by the charter. The words found in section 7, which authorize provision for the punishment of any violation of certain ordinances refer to *such* regulations as the council is authorized to pass and have executed as may be necessary and proper to preserve the peace and good order of the city, and to maintain its cleanliness and health. They surely do not justify a fine, and in default of payment, the imprisonment of the transgressor of the ordinance attacked in this instance.

The State of Louisiana vs. George L. Bright, p. 1.

MUNICIPAL CORPORATIONS—Continued.

The city of New Orleans has control of its streets and drainage, and may improve the one and alter the other as circumstances require.

The city can change its system of drainage and do whatever is essential to perfect it, but it cannot wantonly and unnecessarily disregard the rights of its inhabitants.

The city can widen a ditch lying along the border of the plaintiffs' Canal Company, but must cover it, as without a covering ingress and egress to and from the canal would be impeded or prevented. In widening the ditch to improve the drainage the city cannot needlessly interfere with the rights and privileges of the canal company. *Carondelet Canal Company vs. New Orleans, p.* 308.

Under its police power, the State has the right to recall and abrogate any powers previously conferred on any municipal corporation and to vest such powers in another and distinct State functionary.

Hence, the Legislature had the power to, as it did by the Act No. 7 of 1870, abrogate the police jury of the parish of Orleans, right bank, and to vest powers of the same in the city of New Orleans, to which that territory including Algiers became henceforth attached.

Under that legislation, the city of New Orleans was clothed with the exclusive power and authority to regulate the use of the river banks on the right bank of the river in Algiers, and that power included the authority of allotting such space as in its discretion was necessary for a public ferry landing.

The legal exercise of that power is incompatible with the right of a riparian owner to encroach, for his personal use, on any portion of the space thus allotted for the use of a public ferry landing.

Such an attempt will be rebuked by the courts, and all obstructions of that nature must be removed.

The case of Watson vs. Turnbull, 34 Ann. 698, affirmed.

T. Pickles vs. Dry Dock Company et als., p. 412.

The Legislature of the State has vested the city of New Orleans with authority to regulate the use of her streets and to authorize the establishment thereon of railroads operated by steam. The ordinance of 1871, No. 1031 A. S., authorizing the N. O. Jackson and G. N. R. R. Co. to use steam on its track on St. Joseph street, was a valid exercise of that power.

The act of the General Assembly, No. 78 of 1870, never went into effect by reason of non-compliance with the terms of its concluding section; and even if it had gone into effect the proper con-

MUNICIPAL CORPORATIONS—Continued.

struction of it would be that it was a mere negative authority to use steam on St. Joseph street, under said act, but that it did not prohibit the city from granting such authority.

A. Hill vs. Railroad Company, p. 599.

Police juries, like all other corporations created under the laws of Louisiana, are artificial beings who can act only in the mode prescribed by the law creating them.

No officer of a police jury can legally bind or stand in judgment for the corporation without special authorization.

Parol testimony is inadmissible in proof of such authorization, as police juries can act only by ordinances or resolutions.

Police Jury vs. City of Monroe, p. 630.

NAVIGABLE STREAMS.

The police juries of the several parishes have no power to interfere with or obstruct navigation on any navigable watercourse, by the construction of bridges without draw across the same or by the erection of embankments therein.

A watercourse will be held to be a navigable stream when in its natural state it is such as to afford a channel for useful commerce.

That condition is not affected by the formation thereon of natural barriers resulting from sand bars or rafts formed by the accumulation of timber. *Goodwill et al. vs. Police Jury p.* 752.

NEW ORLEANS WATERWORKS COMPANY.

The act of incorporation of the New Orleans Waterworks Company forbids it to charge more for water than was paid to the city at the date of its incorporation on March 31, 1877, and the charge made by the city at that time was fifteen cents for a thousand gallons to large consumers.

An owner of a rice-mill in New Orleans is entitled to the use of water conveyed through the pipes and conduits of the Waterworks Company on paying in advance for his supply at that rate.

J. Levy vs. N. O. Waterworks Company, p. 25.

NEW TRIAL.

The right of judges to grant new trials *ex officio* is subject to the same delays which apply to parties.

Culverhouse et al. vs. Marks, p. 667.

NOTARY.

A notary will not be held individually responsible for paying the price of sale, deposited by the purchaser, to the ostensible owner and vendor in the absence of proper instructions given to him and *accepted* by him to pay it otherwise.

J. A. McCoy vs. H. Weber et al., p. 418.

PARTITION.

In partition suits between co-owners, who are "of age and present," but who "cannot agree on the partition and mode of making it," the rules established by the Code relative to the partition of successions, are applicable, under the express terms of C. C. 1290.

Whether the judicial partition is made in kind or by sale, it is now settled that the mortgages and privileges created by one co-owner on his own undivided share, are transferred from the entire property to the share allotted to him, or, in case of sale, to his share of the proceeds.

After such a sale, when a rule is taken upon the mortgage creditor to show cause why his mortgage should not be cancelled and erased as affecting the property, the creditor cannot, in answer thereto, attack the validity of the judgment of partition, unless at least for absolute nullities.

The co-owners in partition suits have the perfect right to agree to submit the questions to the court, on issue properly joined, and the judgment of the court rendered, on such issue, according to law and evidence and not according to any consent, is not a consent judgment.

Parties have the right to waive delays with reference to submission of their causes and the signature of judgments therein, without impairing the validity of the proceedings. After judgment in partition and proceedings commenced in execution thereof by advertisement of the sale, a seizure under executory process by the mortgage creditor forms no obstacle to the sale, which proceeds, subject to the rights of the creditor, which, as shown, pass to his debtor's share of the proceeds.

The share of the co-owner under a partition sale is only ascertained after deduction of his share of the costs of the proceeding, and the mortgage creditor must submit to such deduction.

R. Beltram vs. C. Gauthreaux et als., p. 106.

A partition by sale of promissory notes belonging to a succession under administration, will not be ordered in the absence of proof to show that such a mode of partition is the only convenient one under the circumstances, and when it appears that such a sale could injure some of the heirs who are minors.

The most convenient and the speediest mode of affecting a partition among the heirs of a succession under administration, of past due promissory notes, is to require the succession representative to enforce the collection of the same, and to divide the proceeds among the heirs according to their respective shares

Halliday et al. vs. Halliday et al., p. 175.

PARTITION—Continued.

When a part-owner of a vessel, suing for a partition and account, has prayed for a sale of the ship, he cannot on appeal complain of a decree of sale made in conformity to the prayer of his own petition never changed or amended.

The principles upon which the decree herein is based are approved, and with the correction of error, apparently clerical, in allowance for commissions is affirmed. *J. Oteri vs. S. Oteri et al., p.* 408.

PARTNERSHIP.

Where partnership property has been sequestered by one of the partners to prevent devastation and irreparable injury by the other partner, and the property remains in judicial custody, this other partner cannot have the sequestration set aside on bond under article 279 of the Code of Practice. He is not such defendant as is contemplated by that article. The sequestration is not of his property, but of the property of the partnership in which he has only an interest.

A sequestration is indivisible so long as the property to be seized is undivided. The release on bond of one half of each piece of property would leave the other half of each piece in the sheriff's hands, and as that officer could permit no interference with that the release would be a vain act.

When acts of preservation are necessary to be done at once on sequestrated property and the judge has issued an order for their performance, a writ of prohibition will not issue commanding him not to execute that order. The judge's first duty is to preserve property in judicial custody.

The State ex rel. Roth vs. Judge, etc., p. 49.

A member of an ordinary partnership, who contracts a partnership debt and who is the financier and business manager of his firm, and the only member having an individual credit, should he pay this debt with his own money or property, could not legally avoid such payment or the contract connected with it, on the ground of error, the error consisting in not knowing at the date of the contract that he was only bound for his virile share and not the whole of the debt. *W. B. Schmidt vs. F. E. Foucher et al., p.* 93.

The following clause in an act of partnership does not attest an agreement binding on both parties that the partnership should continue at the death of one of the partners between the survivor and the heirs of the deceased: "In the event of the death of either of the

PARTNERSHIP—Continued.

parties to this act, it is to be optional with the survivor whether said co-partnership shall continue or not."

Such a stipulation does not create an agreement equally binding on both parties, but it gives all the advantage to the survivor, without any corresponding right to the heirs of the deceased. It does not comply with the requirements of the Civil Code touching the right of continuing a partnership after the death of one or more of the partners, and it has no sanction in law. Hence, it cannot be enforced. *E. J. Hart & Co. vs. Anger & Nicol, p.* 341.

Held, that plaintiff was and remained one-fourth owner of ship "S. J. Oteri" until November 14, 1883, at which date his interest terminated by his voluntary acceptance of the return of the price which he had paid for said interest.

Held, that for the trips made by said ship prior to August 24, 1883, when the firm of S. Oteri & Bro. was dissolved and terminated, he is entitled to accounting of profits on same basis as had been always customary in previous transactions.

Held, that after the termination of the partnership, plaintiff's interest in the mercantile ventures of buying and selling fruit, thereafter carried on by S. Oteri, ceased; and that, as he could not be held for losses on such ventures, he cannot claim the profit. His interest thereafter was confined to his share of the earnings of the vessel *per se*. As these have not been kept in such manner as to enable us to ascertain their actual value, and as this is the fault of defendant, plaintiff is allowed his share of a liberal charter-price of the ship during that period. *J. Oteri vs. S. Oteri, p.* 403.

PETITORY ACTION.

In a petitory action the description of the lands in suit, by sections and townships in reference to United States surveys, is sufficient. That is certain which can be made certain.

A petition charging that the defendants are in joint possession of the lands in suit, is not amenable to the objection that it does not charge what portion of the several tracts sued for is in the separate possession of any of the defendants.

Louis et al. vs. Giroir et als., p. 723.

When in a possessory action the parties urge claims and counter claims which necessarily involve the question of title, and are clear incidents of ownership, an issue which cannot be tried in such an action, the parties will be relegated to the petitory action as a necessary step to a proper adjudication of such claims.

PETITORY ACTION—Continued.

Courts cannot be required to decide controversies by piecemeals—a decision of the fundamental question must precede a discussion of rights incident thereto.

Mrs. H. Huyghe vs. H. Brinkman, p. 836.

PLEADINGS AND PRACTICE.

An amended petition which purports to supply omissions in general allegations contained in the original petition, and to correct clerical errors in other allegations, and which conclude with a prayer for the same amount of money, based on the same cause of action, does not alter the substance of the demand, and is therefore admissible.

H. M. Payne vs. Railroad and Steamship Company, p. 164.

The joinder of an action against one defendant for damages for breach of contract with an action against another defendant for damages resulting from a tort, is not good ground of exception where the defendants have been allowed to sever in their defense and separate trials have been had even if it be objectionable where there has been no severance.

It is not mis-joinder for a plaintiff husband to sue in his own name for money expended for his wife's illness caused by an injury to her, and for damages for her sufferings caused by that injury, since these damages fall into the community of which he is the head and master. *L. Holzab vs. Railroad Company et al., p.* 185.

Where a peremptory exception, sustained below, has been reversed on appeal, and the record leaves in doubt whether a trial on the merits was had, the cause will be remanded for a trial thereof.

J. McDougall vs. J. Monlezun et als., p. 223.

A peremptory exception, which goes to the very foundation of the suit, such as the alleged nullity of the citation, should be decided *in limine*, hence it is bad practice in a court to refer similar exceptions to the merits.

If there is no citation there can be no trial on the merits, hence the injustice of subjecting the parties to the trouble and expense of introducing evidence on the merits, when eventually the case may go off on the exception.

A judgment against an absent party on whom citation was served through his alleged attorney, in fact, but who is shown not to be such an agent, is practically against a party who is not legally before the court, and is therefore a nullity.

A. A. Farmer vs. Hafley, administrator, p. 232.

PLEADINGS AND PRACTICE—Continued.

A suit in revendication of real estate must be dismissed, where it appears that prior to the institution thereof, the plaintiffs have sold all their interest to the land.

The dismissal of such suit carries with it that of an intervenor claiming the same property as plaintiff's vendee, the more so, where in terms the judgment so expressly declares.

Barron vs. J. W. Jacobs et al., p. 370.

Defenses of want of consideration, extinguishment by remission, prematurity resulting from inexpiration of extension of time granted, against a mortgage note sued on, are inconsistent and inadmissible.

An injunction on those grounds, the evidence sustaining neither, is properly dissolved.

An appeal from the judgment dissolving is frivolous, and damages are allowable. *Citizens' Bank vs. N. M. Benachi, p.* 376.

Exceptions which affect the very foundation of the suit should be decided *in limine*, and should not be referred to the merits.

A demand for the payment of the price of property, which is in fact an action for the specific performance of a contract of sale, is inconsistent with a demand for the recission of the sale for nonpayment of the price, and on a timely exception by defendant, plaintiff should be required to elect between the two inconsistent demands. *R. L. Cochran vs. Mrs. Violet et al., p.* 525.

When peremptory exceptions filed *in limine* have been tried and overruled, and answers have been filed, and at a subsequent term the case has been fixed and taken up and is on trial on the merits, the judge has no authority to interrupt said trial, and, of his own motion, to set aside the former judgment on exceptions and grant a new trial thereof, and forthwith to hear them and render judgment thereon sustaining the exceptions and dismissing plaintiff's suit.

The exceptions, *as such*, were out of the case, and the judge had no more authority to reinstate and try them *as exceptions*, than he would have had to interpose such exceptions originally.

The overruling of exceptions is not *res judicata* on the subject matter thereof and does not preclude the court from rendering a different ruling when the same matter is brought up anew in proper form, as by answer to the merits; but this principle does not authorize the Court to revive a defunct exception, and by sustaining it, defeat and deny the trial on the merits, which has been regularly opened. *Culverhouse et al. vs. Marks, p.* 667.

PLEADINGS AND PRACTICE—Continued.

Plaintiff's want of authority to institute suit must be specially urged by way of exception *in limine litis*, or it will not prevail.

Heirs of Mason vs. Mrs. Layton et al., *p.* 675.

Plaintiffs seized certain movables as the property of their debtor. A third person intervened claiming title and possession under transfer before sale and asked for judgment decreeing him to be the owner. Plaintiff answered alleging his title to be in fraud of creditors and simulated. Before trial intervenor moved to strike out all the allegations except those showing simulation and to restrict the issue to simulation *vel non*. The case was so tried.

Held, that after thus accepting and submitting this issue to the decision of the court, intervenor cannot now dispute plaintiff's right to raise this issue otherwise than by a direct action in declaration of simulation, even if otherwise the objection was tenable as to alleged simulation of sales of movables, on which it is unnecessary to express an opinion.

In such a proceeding the allegation that the sale attacked embraces all the property of the debtor, is a sufficient allegation of injury to the creditor.

On the facts of the case, the evidence sustains the conclusions of the judge. *E. G. Schlieder vs. L. B. Martinez*, *p.* 847.

It is unnecessary that all joint obligees interested in the enforcement of a joint obligation, should be joined as plaintiffs in a suit to enforce it. Anyone may sue and recover thereon to the extent of his interest in it. *Commissioners, etc., vs. Converse et als.*, 871.

The charge that a plaintiff sues in two capacities that are inconsistent with each other, should be taken advantage by exception. It is too late after judgment and by motion for a new trial.

Ashbey vs. Ashbey, *p.* 902.

The object or purpose of a suit or the matter in dispute should be determined not by the prayer of the petition alone, but from the body of the petition in conjunction with the prayer.

Even if the prayer does not ask in plain terms the decree that the allegations of the petition would clearly warrant, such omission will not prejudice the petitioner's right to recover on the averments of his petition, where they are sufficient to sustain the proper action and decree, and there is a prayer for general relief.

The State ex rel. Levet vs. Lapeyrollerie, *p.* 912.

A decree of this Court reversing a judgment of the district court rejecting all evidence in support of a party's demand, on the ground

PLEADINGS AND PRACTICE—Continued.

that his petition set forth no cause of action, has only the effect of deciding that if *all* the averments of said petition are proved, the party is entitled to some relief.

Where, after trial on the merits, certain important allegations are not proved, the case is in no manner affected by our former decree, but stands on its intrinsic merits.

Flower, Adm. vs. Mrs. Noble, etc., p. 938.

PLEDGE.

It is now settled in jurisprudence that the property held in pledge by a creditor may be seized out of his possession by another creditor of the pledgee, and sold subject to the pledgee's claim.

If the thing pledged is a promissory note the pledgee made garnishee cannot be heard to urge the defense that the note is only accommodation paper, pledged for a specific purpose, and not to be enforced against the drawer for any other purpose, as such defense could be resorted to by the drawer only when sued on the note.

Kirkpatrick & Co. vs. Clay Oldham, p. 553.

Delivery of the thing pledged is essential to the validity of the contract of pledge.

What constitutes delivery depends on the nature of the object pledged and on the circumstances of the case.

The pledgee need not always have manual corporeal possession of the thing pledged.

A third person may be detainer of it by agreement between the parties. C. C. 3162.

The pledgor may have possession of the thing pledged for account of the pledgee. He occupies then the position of trustee or possessor *ad hoc.*

Under a cession of property the creditors of the insolvent do not acquire a right of ownership in the property surrendered, but only the right of possession and the power of administration. The ownership remains in the insolvent. C. C. 2178, 2182.

If among the assets of the insolvent there be a thing pledged, the possession of it does not pass to the creditors, being vested in the pledgee. No man can transfer a greater right than he himself has.

The obligation of pledge is contractual. It vests in the creditor the right of possession and of privilege on the thing pledged. The right of detention being as much a part of the security as the things pledged are a part of the guaranty, the creditor cannot be deprived of same by the voluntary act (bankruptcy) of his debtor

PLEDGE—Continued.

nor by the insolvent laws of the State. The obligation of contracts cannot be impaired.

Notwithstanding the pledgor's insolvency, the pledgee can proceed to sell the pledge in the way stipulated by the contract.

A power of attorney, coupled with an interest, is not revoked by the death or bankruptcy of the principal. Art. 3027 of the Civil Code applies to a gratuitous mandate.

G. Jacquet vs. His Creditors, p. 863.

POLICE JURY.

Police juries like all other corporations created under the laws of Louisiana, are artificial beings or persons who can act only in the mode prescribed by the law creating them. The president cannot stand in judgment for the police jury, without special authorization. Affirming Police Jury of Ouachita vs. Mayor and Council of Monroe, 38 Ann. *Huffpauir, President, etc., vs. Wise*, p. 704.

POLICE POWER OF STATE.

A contract entered into with the State Board of Engineers, under Act No. 7 of 1884, for cutting the bends and straightening certain navigable watercourses in this State, the expense of which is borne by private and interested individuals, and under the circumstances detailed in opinion, is a private enterprise and cannot be maintained or enforced on the pretense that it is in the exercise of the police power of the State, or that it finds sanction in the levee laws of the State. *Chaffe & Sons vs. Trezevant et als.*, p. 746.

POSSESSION.

One who claims property by inheritance from his mother and at her death goes into possession of the same under an honest belief that he is the sole heir, a belief founded on the fact of his brother—the only other child of his mother—having joined the army in the war between the States, and not being heard from thereafter up to the death of the mother, an interval of many years, is a possessor in good faith. As such possessor, he can only be made liable for rents from judicial demand, if evicted, and the party evicting must pay him for improvements, to extent of the price of the materials and the workmanship, or the enhanced value of the soil, and if the latter is not proved the measure of reimbursement must be controlled by proof of the former.

Hutchinson, Tutor, vs. Mrs. A. Jamison et als., p. 150.

PRESCRIPTION.

In a petitory action met by the defense of the prescription of ten years, the main legal discussion involves the question of the alleged just title, the good faith and the length of time of the defendant's possession of the property in controversy. The legality or validity of plaintiff's title is a question of secondary consideration, which comes up in case only that defendant's plea of prescription should not be found good.

A just title is one which in form and intent is translative of property, which the purchaser acquires from one whom he believes in good faith to be the true owner.

If the possession begins in good faith, the right of pleading the prescription of ten years is not affected or impaired by the fact that the possession may subsequently have been in bad faith.

Irregularities and defects in a tax deed, which is *prima facie* valid, and which are not apparent or stamped on the face of the deed, are cured by the prescription of ten years.

Prescription is suspended by the minority of the parties against whom it is pleaded. Hence, if it appears from the record that the party to be affected by the plea of prescription was a minor a short time before the time at which it must have begun to run, and if the record does not show the precise time at which he obtained his majority, the cause will be remanded for trial of that issue.

R. R. Barrow et al. vs. Mrs. M. Wilson et als., p. 209.

An action to annul a judgment must be brought within a year of its rendition where the suit is based upon alleged frauds or ill-practices, or within a year of the discovery of the same.

Where a party is duly notified of such alleged frauds and ill-practices, orally or by writing, as by means of a petition duly served on him, and refuses to believe the oral communication or to read the written notice, he will be bound, he will be held to be duly notified as if he had in fact taken thorough personal cognizance of the information imparted. *Mrs. A. Bory vs. N. K. Knox, p.* 379.

Dismissal of a suit, on motion of defendant's counsel, because of failure of plaintiff to furnish bond for costs as required by an order of the court, does not constitute such voluntary abandonment by plaintiff as will defeat the operation of the suit to interrupt prescription.

S. Belden vs. Slaughterhouse Co., p. 391.

Good faith purifies the title of its defects and causes the possessor under a just title to be preferred to the true proprietor who has remained so long neglectful of his rights.

PRESCRIPTION—Continued.

That there is no defect stamped on the face of the deed is what is meant by valid in point of form.

A possessor cannot be deprived of pleading prescription because he might, by inquiry and careful examination, discover that his vendor had no title.

A title defective in form cannot be the basis of prescription. By this is meant a title on the face of which some defect appears, and not one that may be found defective by circumstances, or evidence *dehors* the instrument.

If, upon examination of the recitals contained in a deed, they prove erroneous, this would only be an error of fact, and would not prevent the possessor under it from pleading prescription.

Mrs. Pattison vs. Dr. Maloney, p. 885.

An acknowledged account is barred only by the prescription of ten years. *Ashbey vs. Ashbey, p.* 902.

PRINCIPAL AND AGENT.

As a general rule, the knowledge of the agent is the constructive knowledge of the principal.

Where an agent acts in double capacity, as in case a president of a bank contracts on the part of the bank with himself as an individual, or as the representative of a firm of which he is a member, if, in such transaction, the president of the bank is faithful to the interests of the bank, his principal and his action is favorable to the bank, his knowledge of any material fact bearing on the validity of the contracts such, for instance, as his own or his firm's insolvency, will be held to be the knowledge of the bank. If, on the contrary, the agent or bank president acts only for his own or his firm's benefit, regardless of the interests of the bank, his knowledge will be not regarded as the knowledge of the bank.

Seixas, Syndic, vs. Citizens' Bank, p. 424.

Jurisprudence has discarded the former stringent rule which made agents of foreign principals personally liable on contracts executed by them in that capacity, without any distinction whether they describe themselves in the contract as agents or not.

In suits against agents to make them thus responsible, courts must endeavor to ascertain from the nature and tenor of the contract, to which of the parties credit was given, and they will be guided by the rule that the agent of a foreign principal is not, as a question of law, personally liable on every contract made for his principal. It

PRINCIPAL AND AGENT—Continued.

is rather a question of fact in each case to be ascertained by the terms of the particular contract and the surrounding circumstances.

To avoid personal liability on a contract made for his principal, the agent must disclose his agency as well as his principal, either at the time that the contract is entered into or when he is sued as personally liable thereon.

In a contract of affreightment, which contains on its face the fact of the agency and discloses by its terms the principal for whom it is executed, the agent will be exonerated from personal liability.

J. H. Maury & Co. vs. L. Ranger & Co., p. 485..

A power of attorney is revoked by the interdiction of the principal, but continues in force until the judgment to that effect has been rendered. The mandate does not expire by the *seclusion* of the principal or his confinement for treatment in an insane asylum; but it does by the *reclusion.*

The word *seclusion*, found in Art. 3027, R. C. C., line 5th, should be read *reclusion.* It was introduced in the Code of 1825 by the compilers. In case of discrepancy between the French and English texts, the former prevails.

Reclusion means incarceration under a sentence to undergo an infamous punishment, carrying civil degradation in a house of forced labor.

Seclusion means a voluntary confinement or retreat from social life.

Ignorance of the revocation of a power of attorney will protect an innocent third party dealing in good faith with the agent as such.

N. B. Phelps vs. Reinach, p. 547.

PRIVILEGES.

The lien of the unpaid vendor of cotton, when enforced in five days, is superior to that of the holder for value of a bill of lading for the cotton.

Although the vendee of the cotton has put it on shipboard, and has drawn his bill of exchange against it, and the bill of exchange with bill of lading attached was bought by an innocent party for full value who has had the bills endorsed and delivered to him, yet if the vendor has not been paid and he pursues his vendee and the cotton within the five days allowed him, he must prevail over the holder of the bill of lading.

The vendor's lien on cotton for five days yields to nothing unless it may be to a warehouse receipt which has been pledged as collat-

PRIVILEGES—Continued.

eral for money borrowed, and not to that unless the receipt has been paraphed before issue "for hypothecation."

Harris, Parker & Co. vs. A. G. Nicolopulo, p. 12.

If a vendor of parts and pieces of machinery of a sugar mill, which are detachable, permit them to be sold confusedly with the mass of machinery and the sugar-house, without provoking a separate appraisement of them, he loses his privilege upon them.

A vendor of such pieces of machinery has no privilege upon the sugar-house and the acre of ground on which it stands and the other machinery in it, and if he ignores the privilege he has and sets up and attempts to enforce the privilege he has not, he will lose that which he has and will be remediless.

Scannell & Lafaye vs. R. Beauvais, p. 217.

The furnisher of machinery and materials for a vacuum pan apparatus in a sugar-house which are removable, acquires no privilege for the price thereof on the sugar-house, all the machinery therein and on the one acre of land on which it is situated; the law restricts his privilege to the machinery and other things which he has sold to the owner of the sugar-house. The decision in Scannell & Lafaye vs. Beauvais, 38 Ann., affirmed.

Shakspeare, Smith & Co. vs. Ware, p. 570.

A sold machinery to B with obligation and guarantee to erect same, and that it should possess a specific working capacity. After having made advances to A, B refused to accept the mill because not complying with conditions of sale, and claimed from A reimbursement of advances. Thereupon, A, B and C made a contract by which C agreed to be substituted as purchaser in place of B, and A agreed to accept him as such substitute and to release B, and C, with the guarantee of A, agreed to repay to B the amount of his advances to A. *Held*, that B was not the vendor of the machinery to C, and was not entitled to vendor's privilege for the sum agreed to be paid to him.

Claycomb & McNeely vs. Bisbee et als., p. 575.

PROHIBITION.

In applications for the writ of prohibition against inferior courts, we must necessarily act on the state of facts existing at the time of the application. If the particular grievance complained of no longer exists, there is no longer any need of the relief sought.

PROHIBITION—Continued.

An application for a prohibition to an inferior judge, based on an alleged usurpation of jurisdiction, in that the suit or a former or similar suit had been transferred from the same judge to the United States Court and was still pending there, must be denied if it appear that the transferred suit has been dismissed from the United States Court prior to the application for the prohibition.
The State ex rel. Davidson vs. Judge, etc., p. 178.

An application for a prohibition will not be considered, unless a plea to the jurisdiction has been first filed and overruled in the lower court. *The State ex rel. Girardey vs. Steele et al, p.* 569.

Exceptions to the *form* of proceedings do not draw in question the jurisdiction of the court.

It is not until an exception to the jurisdiction of an inferior court has been filed and illegally overruled that a prohibition lies from this Court. *The State ex rel. Smith vs. Judge, etc., p.* 920.

In an application for writs of *certiorari* and prohibition, the complaint of the relator that the inferior court has issued an unwarranted execution against his property, will not be favorably entertained by the Supreme Court, if the record shows that the relator had himself previously submitted to the court *a qua* the question of the alleged illegality of the execution which he resists by means of an injunction.
The State ex rel. Gooch vs. Justice of the Peace, p. 968.

PUBLIC OFFICERS.

An agreement entered into between two rival candidates for a public office, whereby each one of them undertakes and binds himself to pay the other, in case of his own election, one-half of the net profits of the office, for the term, is in violation of good order and public policy, subversive of the best interests of society, has a tendency to destroy the safeguards of the ballot-box and cannot be enforced by the courts. *J. N. Glover vs. Taylor, p.* 634.

RECUSATION.

Prohibition lies against a judge who takes jurisdiction to decide a plea of recusation against himself, on the ground that he had been employed as advocate in the cause.

A rule, taken in a cause in which final judgment has been rendered, calling defendant to show cause why a writ of *capias ad satisfaciendum* should not issue, and why he should not pay the judgment or be sent to prison, is a proceeding in the same cause, and the

RECUSATION—Continued.

judge who has been employed as advocate, even before the judgement, is subject to recusation. Nor is the case affected by the fact that he had been the counsel of the party who claims his recusation. *The State ex rel. Trimble vs. Judge, etc., p.* 247.

It is the duty of a judge recusing himself upon grounds other than *personal* interest in the suit, to appoint a lawyer, having the qualifications of a judge, of the district in which the recused case is pending; and if no lawyer can be obtained at the term of the court at which the recusation is declared, the judge shall immediately appoint some judge of an adjoining district to try the case

In the event the recused cause shall not have been tried within nine months from the date of the recusation, it shall be the duty of the district judge to order the transfer of the case to the district court of the nearest parish in the adjoining district, the judge of which. is competent to try the case.

In case of such transfer of the suit, the judge of the court to which the transfer is made has as full and complete authority and juristion over the same as if it had originated in that jurisdiction.

The State ex rel. Gates vs. Judge, p. 452.

Under the provisions of Act No. 40 of 1880, the judge of an adjoining district, who is called to try a cause, in which the presiding judge is recused, acts *pro hac vice* and in *that court,* and during the time he is thus engaged in the performance of duty, the presiding judge is displaced.

The judge of an adjoining district thus appointed, has no authority to grant an order at chambers within his own judicial district, and in his capacity as judge of the latter, transferring the suit to an adjoining district. Such an act is a nullity.

J. O. Halphen vs. Gilbeau et al., p. 724.

REGISTRY.

The unpaid price of sale of movable property, unless it be specially provided to the contrary, is secured by vendor's lien.

A sale and counter-letter of movable property, recorded in the conveyance office in which transfers and contracts relative to real estate *alone* are required to be registered, are not notice to third persons equivalent to knowledge.

McCann & Son vs. Bradley, p. 482.

REMOVAL TO U. S. COURT.

A suit upon an account by a commercial firm of Missouri against a commercial firm of this State and the members thereof *in solido,*

REMOVAL TO U. S. COURT—Continued.

presents a single controversy, which is removable to the U. S. Courts by parties on either side; but all the parties on the same side must concur in the application, and one defendant cannot remove in opposition to the wish of his co-defendants. In this case one partner of defendant firm claimed, while the other opposed, the removal, and the application was properly denied.

In a second application, the defendant Trager alleged that there was a separate controversy between himself on the one side and his co-defendants and plaintiffs on the other, and asked a removal on that ground. We find no such controversy presented on the record, and the judge did not err in refusing the removal.

Fusz & Buckner vs. Trager & Noble, p. 173.

To entitle a party to a removal to the United States Circuit Court, there must exist in the suit a separate and distinct cause of action, upon which a separate and distinct suit might properly have been brought and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different States from those on the other.

To say the least, the case must be one capable of separation into parts, so that in one of the parts a controversy will be presented with citizens of one or more States on one side, and citizens of other States on the other, which can be fully determined without the presence of any of the other parties to the suit, as it has been begun. *Succession of Kate Townsend vs. Sykes et al., p.* 410.

RES JUDICATA.

A *mandamus* will issue to compel a railroad company to allow the transfer, on its books, of shares in the name of the relator, when it is established that a party, to whom the company says the stock belongs in part, has been finally adjudged not to have any interest therein.

The judgment, although foreign, having acquired the force of *res judicata*, must be given that effect. On a charge that it is erroneous, this Court will not go behind it to test its correctness.

The State ex rel. Plaisent vs. Railroad Co., p 312.

A final judgment rejecting, on the ground of prescription of four years, an action by a minor against his tutor for acts of the tutorship, cannot sustain the plea of *res adjudicata* to a subsequent action between the same parties for an account of the usufruct by the surviving parent of the property of his child, after the termination of the usufruct. *R. L. Cochran vs. Mrs. Violet et al., p.* 525.

RES JUDICATA—Continued.

In civil actions the verdict of the jury, like a judgment, forms the authority of the thing adjudged upon all matters and demands set up in the pleadings; and it is not required that the verdict should contain a statement of all the considerations which led the jury to find a general verdict.

Thus, the jury in finding a verdict in favor of plaintiff in full of his demand against parties who are sued as partners, need not say that they found the existence of the partnership, although the same may be especially denied as a means of defense.

The silence of the jury on a reconventional demand, when they return a general verdict in favor of plaintiff, will be construed as a rejection of said demand.

The same construction will be applied to a privilege prayed for by plaintiff. *Shakspeare, Smith & Co. vs. Ware*, p. 570.

When the defendant in a suit files a plea to the jurisdiction of the court and the plea is overruled and a judgment rendered, and no appeal is taken, the question of jurisdiction becomes *res adjudicata*, and the judgment cannot in a collateral proceeding be treated as an absolute nullity for want of jurisdiction in the court rendering it. *Tutorship of Minor Heirs of Byland*, p. 756.

It appearing from the unambiguous language of a written compromise made the basis of a judgment, that the terms thereof did not embrace the thing demanded in a subsequent suit, the plea of *res judicata* is overruled.

Amount of attorney's fee fixed according to the circumstances of a particular case. *Succession of J. L. Sterry*, p. 854.

REVOCATORY ACTION.

In a revocatory action three things are requisite to maintain it—fraud on the part of the vendor, knowledge on the part of the vendee, and actual injury to the other creditors.

Knowledge may be express or constructive. *Seixas, Syndic, vs. Citizens' Bank*, p. 424.

Where a judgment creditor resorts to a revocatory action to annul a sale made by his debtor, on the ground of fraud, such debtor and vendor in the contract assailed is a necessary party to the suit. *S. Black vs. Bordelon, Tutor*, p. 696.

SALE.

Parties offering goods and wares on the market, through brokers whom they employ as their agents for such purposes, are bound for all the stipulations made in their behalf by their said agents.

SALE—Continued.

This obligation includes guarantees that perishable goods will keep good and merchantable during a certain period of time.

Goods of a uniform nature, such as manufactured liquid goods, for instance syrup, which are sold to be delivered in separate packages, may be returned as unmerchantable, even though some of the packages have the appearance of being good and sound.

The redhibitory defects of such goods cannot be tested under the rule of law which provides that the vice of one of several things sold together, gives rise to the redhibition if all of the things were matched, such as a pair of horses; but it must be governed by the principle which releases the purchaser from his contract when it appears that the defect of the thing sold renders its use so inconvenient as to justify the conclusion that he would not have purchased it had he known of the vice.

Flash, Preston & Co. vs. American Glucose Co., p. 4.

The conveyance of property in the form of a sale does not vest the ownership in the apparent buyer if the deed was really intended by both parties to be a mortgage.

The answers of one of the parties to interrogatories on facts and articles propounded by the other, are equivalent to a counter-letter and have the same force and effect. They are unquestionably admissible in evidence. *L. A. Crozier vs. W. H. Ragan, p. 154.*

When parties really intend to create a mortgage for the security of an existing or contemplated debt and adopt the form of a sale with a counter-letter which, taken together, exhibit such intention, the contract will be construed as a mortgage and effect will be given to it accordingly.

But when the act of sale and the counter-letter both concur in asserting that it is a sale, the latter containing the agreement that the vendor may redeem within a given time, it must be held to be a sale with the right of redemption, and if the right is not exercised within the time agreed on it is lost forever.

When the vendee or his representative, he being dead, attempts to sell the land before the expiration of the time for redemption, and the vendor injoins the sale on other grounds and the time expires before the trial of the suit, the defendant will be mulcted in costs that were incurred before the expiration of the time.

A. D. Henkel vs. Sheriff et al., p. 271.

A contract, evidenced by an act of sale and a counter-letter, which together show that the sale, made part cash and part on time, al-

SALE—Continued.

though not designed by the parties to be absolutely final and conclusive, but intended to enable the vendor to use the notes in his business, the title to be put back in the vendor's name as soon as the notes issued are retired and returned to the purchaser and drawer, does not establish a simulation, but a real transaction, by which the title passed.

Purchasers of such notes, for a valid consideration and before maturity, are entitled to recover the amount thereof, with lien on the property sold. *McCann & Son vs. H. Bradley, p.* 482.

A sale cannot be annulled by an opposition to a distribution of the proceeds of the sale. When a sale is real, a direct revocatory action must be brought for its annulment.

When there is opposition to the distribution of the proceeds on a bare allegation of fraud, collusion, etc., in making the sale, the Court will not delay the distribution until it shall suit the pleasure of the opponent to institute a proper action to annul it, unless he has used some conservatory process to prevent the distribution.

Succession of Anger, p. 492.

An heir, or the transferree of an heir, acquires the right the decedent possessed, to sue for the resolution of a sale for the non-payment of the purchase price; but same is necessarily restricted to the interest of such heir or transferree.

A right to sue for the enforcement of a vendor's lien is different from that to sue for the resolution of a sale; and the former is not an auxiliary of the latter. This right does not pass to the purchaser of the vendor's notes, unless there be a special contract to that effect.

Neither the heirs of a deceased person nor the transferree can sue for the resolution of a sale until previous tender has been made of the outstanding purchase notes, and such part of the price as may have been paid by the purchaser.

Such a tender is a condition precedent to the institution of the suit.

Heirs of Castle vs. Mrs. Floyd et als., p. 583.

There can be no contract of sale without a fixed price. Where the consideration of a contract called by the parties a sale, is that the transferree of the property shall settle a certain debt of the vendor on the most advantageous terms, without any sum being named, and the transferree takes possession of the property and settles the debt and records his title, though the contract cannot be regarded a sale, yet a creditor of the vendor or transferor, who

SALE—Continued.

seizes the property, must first pay out of the proceeds to the transferree in said contract, in possession, the amount that he, the transferree, had paid in settling the debt of the transferor or vendor. *J. S. Prude vs. R. C. Morris et al., p.* 767.

SEIZURE.

The seized debtor has not the right to point out property to be seized when the creditor who prosecutes the execution of the judgment has a privilege or mortgage on the debtor's property.

The seizure of immovable property is not invalidated by the failure to serve notice of seizure on the tenants. Pipkin vs. Sheriff, 36 Ann. 782, affirmed. *Mrs. Lambeth vs. Sentell et als., p.* 691.

SIMULATION.

When a sale is a mere simulation it may be disregarded and be treated as a nullity by a creditor of the seller, but when the sale is real, however fraudulent, the creditor cannot seize the property in the possession of the buyer, but must resort to the revocatory action. And this rule is applicable to the sale of movables as well as immovables. *J. C. Johnson vs. Kingsland & Ferguson, p.* 248.

In a direct action to revoke a sale, containing the requisite averments and prayer for the revocatory action, and where the sale is alleged to be "simulated and fraudulent," the judge is authorized to grant the relief if the evidence establishes either simulation or fraud, or both. Affirming Johnson vs. Mayer, 30 Ann. 1203.
W. Mackesy vs. T. Schulz et al., 385.

In a case of doubt, where the circumstances are suspicious, this Court will not reverse the conclusion decreeing the simulation of a sale of the judge *a quo*, who saw and heard the witnesses.
Claycomb & McNeely vs. Bisbee et als., p. 575.

This suit is an attack by a creditor upon titles of third persons, on the ground that they are pure simulations, and that the property belongs to the debtor and is subject to his debts.

On the evidence the simulation is not established to our satisfaction.
Todd, Curator, vs. Larkin et al., p. 672.

SLANDER.

In an action in damages for slander, the only possible defenses are: either a *denial* or a *justification*, or a confession, under mitigating circumstances. There is no such thing in law as a half-way justification. An answer which sets forth all these defenses equivocates and is inconsistent.

SLANDER – Continued.

Drunkenness is not a defense to such an action, though it may perhaps be a matter in mitigation.

Neither is apology, unless accepted, to operate a release from responsibility.

Whatever be the provocation under which one acts, who uttters abusive and defamatory epithets, it cannot be imputed to the party injured, who did not participate or is not connected with it.

The unauthorized use of opprobrious epithets which reflect upon and bring into contempt and disrepute the honor of a female of good social standing, implies malice, as slanderous *per se*, and suffices to maintain an action in damages without proving special damage.

Although injuries to the feelings, and to one's social *position*, be not susceptible of precise adjustment, still they are recognized as a legitimate ground for the recovery of reasonable indemnity, under the exceptional features of each case.

Where excessive damages are allowed, they may be reduced on appeal.

Mrs. C. Williams vs. D. McManus, p. 161.

SUCCESSIONS.

After a succession has been fully administered, all its debts paid, and nothing remains in the administration except the property, the purposes of the administration are fully accomplished, and the heirs, all and singly, have an absolute right to require it to be terminated and to be put into possession of the estate.

The wishes of some of the co-heirs for a continuance of the administration cannot control or destroy the legal right of the others to terminate it to enter into possession of their own.

Succession of E. S. Powell, p. 181.

The administrator of a succession which, though apparently solvent, owes debts and is unsettled, and which the heirs, though present, have never accepted, may bring a real action for the revendication of property claimed to belong to the succession and held by adverse title not derived from the decedent, in his own name and without joining the heirs.

The law and jurisprudence on the subject fully reviewed.

Woodward, Administrator, vs. Thomas et als., p. 238.

An administrator of a succession against whom a judgment has been rendered in order to remove him, has the right of appeal from said judgment, and having perfected such an appeal, he has a right of appeal from an order of the court appointing another person to succeed him in the administration of the succession; such an appeal may be treated as an auxiliary to the other.

SUCCESSIONS—Continued.

The Supreme Court has jurisdiction over a contest involving the right of administration of a succession, if the assets of the latter exceed $2000. *Succession of Seth Bedford, p.* 244.

An administrator is not compelled to sell the working animals to pay the debts apart from the plantation. They are immovable by destination, and if they die during the term of the administration the administrator is not to be charged with their value in the absence of fault or negligence on his part.

Nor should an administrator be charged with the annual rents of the plantation, where, after the proper efforts, he has been unable to lease the plantation to a suitable tenant, and has been compelled to work the place on account of the succession. In such case he is subject to no charge for rents or for failure to make adequate crops where it is not shown that such failure is attributable to his fault. *Succession of Mrs. M. A. Myrick, p.* 611.

Article 990, Code of Practice, does not contemplate sales of property of estates made at the instance of succession representatives, but such as are applied for by creditors only. Under the provisions of the Constitutions of 1845, 1852 and 1864, and statutes enforcing them, clerks had jurisdiction and authority to grant orders for the sale of succession property. 12 Ann. 56, Succession of Boyd; 21 Ann, 505, Wood vs. Lee.

The clerk having been possessed of jurisdiction to grant the order, same protects the adjudicatee and subsequent purchasers.
Davie vs. Scriber et als., p. 654.

A creditor who has an unliquidated and unacknowledged demand against a succession, is not bound to prosecute the rendition and effect the liquidation of his claim and its recognition and enforcement by an opposition to the account, but may proceed at once by an independent and direct action for that purpose.
H. Stafford et al. vs. Succession of McIntosh, p. 664.

There is no law to justify and no room or reason for the appointment of an administrator to a succession which owes no debts, and after the property has been put in the possession of the heirs who have accepted the same, thus winding up and finally settling up the succession.

If the existence of debts should be afterwards discovered, the creditors would have recourse against the heirs, but not against the succession which has ceased to exist. *Succession of Thibodeaux, p.* 716.

SUCCESSIONS—Continued.

When a community is unliquidated and owes debts, the administration of the estate of the husband involves that of the community, and the community property may be validly sold by the administrator of the husband's succession for the payment of community debts.

In case of sale by an administrator to pay debts, rules applicable to alienation of minor's property do not apply, and citation to heirs is unnecessary. *Oriol, Tutor vs. Herndon et al., p.* 759.

A probate sale, made in pursuance of an agreement between the executor of the estate to which the property belongs and his partner in business, by which such partner is to buy the property in his own name but for the benefit of his firm, is void.

Carroll et al. vs. Cocherham et al., p. 813.

After judgment has been rendered homologating an executor's account so far as not opposed, other opponents cannot come in and attack the account. The delay fixed by law must have elapsed before an homologation can be made, and they who have permitted it to pass without preferring their complaints are shut out thereafter.

But where an opposition contesting generally the whole account has been filed in time, this opponent may supplement her opposition by specifications and amplifications of the original after the homologation has been made. The judgment qualified by the words "so far as not opposed" reserved her rights.

An opponent heir who alleges that she signed a receipt to the executor in full settlement in error, and that the real estate of the succession has been bought by the executor through an interposed person, and so seeks to annul the sale and bring the property back into the succession, is not required to make tender of the sum she has received before she can be heard to impugn the settlement or attack the sale. *Succession of E. Commagère, p.* 830.

The law authorizes oppositions to accounts rendered by succession representatives to recognized heirs, ordered to be put in possession of the estate.

Such opposition may be made either by the heirs themselves or "*other claimants,*" under the express provision of the Code of Practice.

The court before which the succession proceedings have been instituted is seized of jurisdiction from the inception to the termination thereof and is competent to pass upon such oppositions.

Succession of J. L. Sterry, p. 854.

The testamentary executor of the will of a decedent, who has been judicially recognized, and who has qualified as such, and who is

SUCCESSIONS—Continued.

also universal legatee under the will, cannot at his option shift his position without the sanction or authorization of the court and assume or exercise rights of ownership of the property of the succession.

Hence, a sale of succession property made by such executor under such circumstances transfers nothing and no rights to the purchaser, and is null and void.

The holder of the property under such a title must account for rents and revenues of the same during the whole time of his possession.

Succession of Kate Townsend vs. Sykes et al., p. 859.

When at a succession sale the widow in community and the tutrix of the minor heirs (sole heirs) purchases a piece of property that belonged to the community, in order to receive a valid title under the adjudication, she is not compelled to pay over the amount of her bid; provided, she is properly charged with it in the account of the administrator and the money is not needed to pay the debts, and where it is shown that after the payment of the debts a balance remains, which is paid over to her by the agent or the one entitled to receive it. *Mrs. Mason et al. vs. E. L. Bemiss, p.* 935.

Claims against a succession, although recognized by the administrator on his tableau as debts of the succession, must be proved up when opposed by heirs and creditors, in default of which they will be rejected.

Promissory notes executed by the deceased and prescribed on their face before they are placed on the tableau will be rejected as prescribed, on the opposition of heirs and creditors, unless interruption of prescription be legally proved.

Estate of Romero, p. 947.

SUPREME COURT.

The writ of prohibition is the proper remedy to restrain a district judge who attempts to enjoin the execution of a judgment rendered by the Supreme Court, on the alleged ground that said judgment is not yet final.

District judges are absolutely powerless to judicially investigate and determine the validity of the official acts of any of the clerks of the Supreme Court. The certified copy of a judgment of this Court issued by one of its clerks and forwarded to the court whence the appeal was taken, is the mandate of this Court for the execution of the judgment, and it must be obeyed by the lower court.

SUPREME COURT—Continued.

That court has no power or authority to ascertain in an injunction proceeding or in any other mode whether the mandate issued properly or otherwise. Complaints for alleged errors of any of the clerks of this Court, in issuing such certificate or in the performance of any of their official functions, must be addressed to this Court only; the power to correct such errors is lodged in no other authority. A district judge will not be held in contempt for assuming powers which he honestly but erroneously believed to be of the essence of his court.

The State ex rel. Heirs of Gee vs. Judge, etc., p. 274.

In a case wherein the judgment of this Court has been reversed by the Supreme Court of the United States, and remanded "for further proceedings to be had therein not inconsistent" therewith, this Court is fully competent to judge of *all facts* not set forth in that finding, and decree as in its opinion justice may require. 91 U. S. 423, *ex parte* French; U. S. R. S. 709, and authorities cited.

The failure of an appellee to request an amendment of the judgment of the district court, and an increase of the tax levy ordered therein, deprives him of remedy therefor in this Court.

The State ex rel. Fisk vs. Police Jury, p. 505.

Under an application for a *certiorari*, a question of law involving the validity of the proceedings attacked may be determined by the Supreme Court.

In the Matter of William Ross, p. 523.

The Supreme Court will take judicial cognizance of its own judgments in the trial of causes involving executions predicated thereon.

Mrs. Lambeth vs. Sentell et als., p. 691.

The Supreme Court will notice *ex propria motu* radical defects of pleadings in consequence; of which no final judgment could be rendered in the premises.

Hoffpauir, President, etc., vs. Wise, p. 704.

Where a court acts clearly within the bounds of its jurisdiction, and no vital defects or irregularities mark the proceedings in a case before it, this Court will not, under its supervisory powers, annul the judgment rendered in such case, though it may be contrary to the law and the evidence.

Inferior courts should, as a rule, respect the decisions of appellate courts, and be guided by their authority; but though it may be charged that the judge of an inferior court has refused to be governed by the decree of the appellate court, on an appeal from one

SUPREME COURT—Continued.

of his own judgments in his (the inferior judge's) decisions in other like cases before him, this Court is without power to compel him to conform his action and conclusions to the views of such higher tribunal.

The State ex rel. Wood & Bro. vs. Judge, etc,, p. 921.

SURETYSHIP.

A surety, sued for indemnity by a co-surety who has paid under judgment, has no interest to question the validity of the transfer by another surety to the plaintiff, where such transfer impairs no right of his against the transferror.

An illegal deduction contained in a judicial proceeding, and corrected by the court of last resort, cannot serve as a foundation for the plea of *estoppel* in a subsequent suit.

Evidence showing the signature of a bond by principal and sureties, suit against the sureties, payment by some of them under judgment, the insolvency of certain of them, and other material facts, authorizes recovery from a co-surety to a certain extent.

Articles 2104 and 3058, R. C. C., must be combined together. When thus construed, they mean that where loss is occasioned by the insolvency of one or more co-sureties, whether solitary or joint, it must be borne by the solvent sureties when called upon by the paying surety for indemnity or reimbursement of what was paid under judgment. *E. F. Stockmeyer vs. Henry Oertling, p.* 100.

TAXATION.

A manufacturer of beer, or one charged as "engaged in the business of a brewery," is not exempt from license taxation under the State Constitution. The subject of such exemption is regulated by Art. 206 of the Constitution. Article 207 refers alone to a property tax.

A brewer or manufacturer of beer is not one "engaged in distilling and rectifying alcoholic or malt liquors," and is not therefore subject to the license tax provided by Section 9 of Act 4 of the Extra Session of 1881; but such license is governed and regulated by section 3 of said act. Under that section, where the receipts are $30,000, and less than $40,000 such manufacturer is only liable to a license tax of ten dollars, instead of seventy-five dollars.

The State of Louisiana vs. Weckerling, p. 36.

A tax of ten mills by the city of Baton Rouge is not illegal because it does not conform to the limit of municipal power of taxation as fixed by the charter of 1878. That feature of the charter must

TAXATION—Continued.

yield to, and be controlled by Art. 209 of the Constitution. The decision in the case of Laycock vs. City of Baton Rouge affirmed.
C. D. Favrot vs. Baton Rouge, p. 230.

Parishes are vested with the power to tax persons and property in incorporated towns, unless such power is withdrawn by legislative authority.

No legislative act has deprived the parish of St. Tammany of the power to levy such taxation in the town of Madisonville.

The Act 110 of 1880, conferring upon incorporated towns the power of amending their charters, only conferred on them the power to regulate their internal organization and the modes and agencies by which the powers and privileges conferred upon them by law might be exercised. It did not authorize them, by such amendments, to extend their powers and privileges or to alter or destroy the existing authority of the State or parish over their inhabitants.

Hence, the provisions of the amended charter of Madisonville adopted under that act, prohibiting the imposition of a parish tax or license, is *ultra vires*, null and void.
Tax Collector and Police Jury vs. Dendinger, p. 261.

Certificates of indebtedness issued by the Board of Directors of the Public Schools of the city of New Orleans during the years 1874. 1875 and 1876, are not evidences of debt against the city. Holders of such certificates have no other claim against the city of New Orleans, beyond the right to participate in the unpaid portions of the taxes levied by the city, in obedience to law, for the respective years in which the certificates were issued; but they have no right to recover judgment against the city thereon with a view to have the same converted into bonds under the provisions of Act 67 of 1884, which is an act amendatory of Act 133 of 1880, intended to authorize the liquidation of the indebtedness of the city of New Orleans. *Labatt vs. New Orleans, p.* 283.

The University of Louisiana is a public institution that the Constitution has recognized, and commanded the Legislature to maintain and support it.

By the Act of July 5, 1884, a contract was made by and between the State and the Administrators of the Tulane Education Fund whereby the State delivered to the Administrators the rights, privileges, franchises, immunities and property of the University, and the Administrators engaged to dedicate all their revenues to its main-

TAXATION—Continued.

tenance and development. This is a consecration of the income of the Administrators to public use, and the property from which that income is derived is therefore exempt from taxation.

The character or quality of taxability is not ineffaceably stamped on property, and it may be removed by the act of its owner. The Legislature cannot exempt from taxation property that is constitutionally liable to it, but an owner of property may translate it to the domain of constitutional exemption by dedicating it to a public use.

Primarily the Legislature determines what is a public use, and when it has declared what may be so regarded, courts will not interfere except in clear cases of usurpation or abuse of authority. What is for the public good and what are public purposes are for the Legislature to say, and it has a large discretion in determining these questions, which will not be controlled by the courts unless under the exceptions above noted and such like.

Although the title to property be not in the public, if the revenues of it are dedicated wholly to public use and purposes, it is public property within the intendment of the Constitution, and possesses all the immunities and is entitled to the exemptions from taxation of public property.

Administrators of Tulane Education Fund vs. Assessors et als., p. 292.

Acts No. 78 of 1876, and 46 of 1877, creating the Fordoche and Grosse-Tête Levee District for the purpose of constructing and maintaining certain special levees and authorizing the levy of a contribution upon the lands protected thereby, are not inconsistent with the Articles of the Constitution of 1879 on the subject of taxation.

Such local assessments for public works, levied not on taxable property generally for mere common public benefit, but only on particular property specially benefited by the works, as an equivalent for the direct benefit conferred, are not considered as taxes within the meaning of constitutional restrictions on the power of taxation.

H. Charnock vs. Levee District Company, p. 323.

Merchants who indiscriminately transact business, both as *wholesale* and *retail* dealers, are liable to a license in each capacity.

New Orleans vs. U. Koen & Co., p. 328.

Under Article 207 of the Constitution, the capital, machinery and other property employed in the manufacture of articles of wood is exempt from taxation, although the same be used as well for purposes which would not entitle the owner to exemption if he exclusively thus used it.

TAXATION—Continued.

In such case, such property is partly taxable and partly not, in proportion of its relative value as employed or used in each business.

Principle applied to a saw-mill and appurtenances employed to manufacture raw materials and articles of wood, but not extended to *vessels* used to convey timbers for saw-mill purposes and which is sold in the market and dressed in the articles of wood.

H. Martin vs. New Orleans et als., p. 397.

Under Act No. 4 of 1882, the license is imposed on the business pursued by an insurance company in the State of Louisiana, and not on business done through branches or agencies established in other States, subject to their laws and to the taxation imposed thereby.

Section 7 of the act applies the same rule of graduation to home companies and to foreign companies transacting business here through branches or agencies; and it might, with equal force, be contended that foreign companies were to be taxed according to their premiums earned at home as well as here as that home companies should be taxed according to their premiums earned through like agencies in other States.

"Rebates" being a deduction from stipulated premiums allowed in pursuance of antecedent contract, the difference constitutes the only premium actually earned by the company, and in estimating the gross amount of premiums the rebates are properly deducted.

Inasmuch as the basis of graduation is restricted to premiums received for business done in the State it is self-evident that the deductions allowed should suffer the same restriction, *i. e.*, the only return and unearned premiums and rebates deducted should be those arising from and connected with the business done in the State.

It seems probable that, in this respect, the defendant has not complied with the law, but as the evidence is not sufficient to fix the license according to this view, non-suit must be given.

The State of Louisiana vs. Insurance Company, p. 465.

The plaintiff and appellee having failed to make the police jury party to rule on sheriff and assessor, to assess the tax demanded, this Court cannot afford him relief.

Proceedings by mandamus are *stricti juris*, and must conform to Code of Practice . . . . . *Fisk vs. Police Jury, p.* 508.

An ordinance of a municipal corporation, authorizing the exaction of certain rates, fees, charges and tariffs from each and every person selling articles within its corporate limits, but *without* the market-house or market-place; or person keeping a butcher's stand

TAXATION—Continued.

within the corporate limits, but *without* the market-place, or market-house, for the purpose of raising *revenue*, is one exacting a "tax" or "license" for revenue, and same cannot be enforced as contributions sought to be raised by the exercise of the police power delegated to it.

The taxing power of a municipality is its only power for obtaining revenue, by exactions levied on its citizens, and that power is limited to the *ad valorem*, or property tax, and the license tax; and any statute or municipal ordinance authorizing a levy beyond the constitutional limitation is null and void.

F. Mestayer vs. S. Corrigé, p. 707.

Under Article 206 of the Constitution, the power granted "to levy a license tax" is discretionary and not mandatory. The State or city may abstain from taxing, or may exempt from license, any occupation or calling, subject to the restriction that, if a particular calling is taxed, the tax must conform to the constitutional rules.

The contrary rule with regard to property taxation results from the provision of Article 203, that "*all* property *shall* be taxed according to its value," and of Article 207, the "following property shall be exempt from taxation, *and no other*."

There are no equivalent constitutional provisions relative to license taxation, requiring *all* occupations or *all* persons pursuing any occupation to be taxed, or declaring that *no other* than certain occupations shall be exempted.

Hence, the city has the right to abstain from taxing, or to exempt, any particular calling or business, and, having by the terms of her ordinance expressly exempted the business of defendant, there is no legislative authority for collecting such tax, and the city's demand must be rejected. *New Orleans vs. J. Mülé. p.* 826.

Held, That under the section 6 of the State license law, Act 4, 2d Ex. Sess. of 1881, a retail dealer whose ordinary license would be five dollars, but who combines with said business the sale of liquors in less quantities than one pint, can only be required to pay a total license of $50, and not $55, as claimed by the parish.

Police Jury vs. Marrero, p. 896.

TAX SALES.

The State Tax Collector cannot be compelled by a mandamus to receive from a purchaser of land forfeited to the State, and again offered for sale in payment of the price bid, where the property is burdened with back taxes due the State and city, three per cent

TAX SALES—Continued.

Louisiana bonds, known as "Baby Bonds," though the purchaser has paid the amount owing for costs, fees, commissions, etc., in cash. *The State ex rel. Luminais vs. Tax Collector, p.* 533.

In testing the validity of sales for taxes, the courts of this State are guided by the same rules which prevail in judicial sales.

A monition which relates to informalities in the decrees under which judicial sales are made and to irregular and defective proceedings connected with the sales, will cure the same defects which are reached and set at rest by the prescription of five years under the provisions of Art. 3543, Civil Code, and both remedies may be invoked to cure informalities in the assessment and in the sale for taxes.

In an assessment not absolutely void, a monition will cure a defect in the description of the property, in listing the same on the resident instead of non-resident rolls, an omission to extend State and parish taxes on separate assessment rolls, and other errors not necessarily fatal to the assessment.

A complaint that the taxes for which property was sold are excessive comes too late after the sale is completed; it may be a good ground for an injunction, but not for a suit in nullity.

Mrs. Kent vs. Brown & Learned, p. 802.

USUFRUCT.

The action for account of the usufruct is barred by the prescription of ten years only, to be computed from the termination of the usufruct.

R. L. Cochran vs. Mrs. Violet et al., p. 523.

WILL.

In a contest over an olographic will, the probate of which has been resisted as soon as the instrument was presented, on the ground that said will is not in the handwriting of the deceased, and is, therefore, a forgery, the burden of proof of the validity of the will is on the party who presents the same for probate.

The proof of the writing and signature of the testator by at least two credible witnesses, which is considered sufficient under the laws of Louisiana, applies only to wills which are not opposed or contested.

In contestations which involve the validity of wills, as regards the genuineness of the same, all legal modes of proof, including the testimony of experts, and comparisons of writings are admissible, and all such evidence must be considered by the courts.

WILL--Continued.

In such cases the alleged physical incapacity of the testator, at the date of the instrument, to write a will or to date the same, is a legal element of proof to be considered. So is the mode of acquiring possession of the will by the party who presents it for probate an element to be considered; and in case that a mysterious or unnatural manner is indicated by the party, the burden of proof is on him to show the actual delivery of the will to him as alleged.

The court will also consider the character of the dispositions contained in a contested will, as a means of testing the validity of the will, by the probabilities of such donations.

When the evidence in a cause is sufficient to justify a final judgment in the case, courts of justice would be derelict to their duty in refusing to give it legal effect and to thus end the litigation.

Evidence and considerations which, in a contest over a will in the olographic form, would justify that the will is not genuine, must carry with them the conclusion that the will was not written by the deceased, and is therefore a forgery.

Succession of Myra Clark Gaines, p. 123.

To constitute a presentation of a will in the sense of the Code it is not necessary that it shall be delivered to the witnesses by the testator with his own hand, and no particular words or set form of speech is necessary to constitute a declaration that the instrument is the testator's will.

It is sufficient if the will, having been written by another at the request of the testator and out of the presence of the witnesses, shall have been read aloud by one of the witnesses in the presence and hearing of the testator and of the other witnesses, and is then held towards the testator by the writer of it, who asks, "Is this paper that has just been read your will?" and the testator answers, "It is," and it is then signed by the testator and is attested by the witnesses in his and their presence.

The object of the law is to guard against a false instrument being exhibited instead of the true will, and that object is accomplished by the formalities above recited.

The circumstance that the writer of the will read it aloud a second time after the witness had so read it, is not an interruption or turning aside to other acts.

WILL—Continued.

Where only some of the heirs contest, it is not good ground of exception that all are not joined for *non constat* that the others wish to contest. *Bourke, adm'r, et al., vs. J. M. Wilson, et al., p.* 320.

In the interpretation of wills the principal aim must be to discover the intention of the testator, and the first duty is to give effect to that intention unless the law reprobates it. To accomplish this, conflicting clauses must be harmonized, or, if they are irreconcilable, the last disposition must prevail over those that precede it. Courts will presume that a testator meant to dispose of his property as the law permits him to do rather that that he intended to do what was unlawful, and will construe his disposition accordingly.

There is not a prohibited substitution in this disposition of property by last will:—"I give and bequeath to my wife all the property, movable and immovable, which I leave at my death, but in usufruct only, and after her death, said property is to be divided equally between my son and the heirs of my said wife, and for that purpose I give her in full ownership one-half of what I may leave, and the other half to my said son to be by him enjoyed after the death of my said wife."

Construed to mean that one-half of the estate was bequeathed to the wife in full ownership, and the other half to the son, but as the testator could give to his wife no more than one-third of his estate, the son being of a previous marriage, her bequest was reduced to one-third. *Succession of R. F. Theurer, p.* 510.

The will of the decedent was probated after due notice to the major heirs and to the legal representatives of the minor heirs; the executor was duly qualified and fully administered the estate; he filed his final account, assigning to the several heirs their special legacies, and fixing the distributive share of the residue falling to each heir and prayed for its homologation, service of the petition having been accepted by the major heirs and the legal representatives of the minors; while said account was pending, said heirs and representatives received and receipted for their said legacies and shares, and granted full acquittance to the executor; and thereupon judgment was rendered homologating the account and granting final discharge to the executor.

After such proceedings, the heirs cannot be heard eight years afterwards to attack the validity of the will and the settlement of the

WILL—Continued.

executor. Such an action will not be sustained upon a bare allegation of error and fraud without the slightest suggestion of the nature and ground of such charge.

The plea of estoppel to such a suit was properly sustained as to all the plaintiffs except John W. Barrow, who was a minor unrepresented at the time, and was no party to the proceedings or settlement.

As to him, however, the prescription of five years from his majority applies and his action is barred.

Heirs of Barrow vs. Barrow, p. 645.